Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec

Volume 2
Domestic Dimensions

August 1995

Royal Commission on Aboriginal Peoples

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DOMESTIC DIMENSIONS

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August 1995

Paper prepared as part of the
Research Program of the
Royal Commission on Aboriginal Peoples

Canadian Cataloguing in Publication Data

Main entry under title:
Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec

Issued also in French under the title: *L'obligation de fiduciaire du Canada envers les peuples autochtones dans le contexte de l'accession du Québec à la souveraineté*

Contents: 1. International dimensions. —2. Domestic dimensions.

ISBN 0-660-16212-6 (volume 1); ISBN 0-660-15581-8 (volume 2)
Cat. no. Z1-1991/1-41-6-1E (volume 1); Z1-1991/1-41-6-2E (volume 2)

1. Native peoples — Quebec (Province) — Government relations.
2. Native peoples — Quebec (Province) — Politics and government.
3. Native peoples — Quebec (Province) — Economic conditions.
I. Canada. Royal Commission on Aboriginal Peoples.

E92.C32 1995 323.1'19701 C95-980218-5

Available in Canada through
your local bookseller
or by mail from
Canada Communication Group — Publishing
Ottawa, Canada K1A 0S9

Cat. no. Z1-1991-1-41-6-2E
ISBN 0-660-15581-8

Canada Communication Group Publishing
Groupe Communication Canada Édition

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Contents

NOTE: The paper presented in this volume was commissioned from the authors by the Royal Commission on Aboriginal Peoples as part of its research program. The opinions expressed in the paper are those of the authors and do not necessarily reflect opinions or positions of the Royal Commission on Aboriginal Peoples.

Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec

Domestic Dimensions

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Introduction (Dupuis)

Consistent with the terms of reference set by the Royal Commission, this paper analyzes the Crown's fiduciary obligations from the perspective of Canadian domestic law in the context of accession to sovereignty by Quebec. We begin by defining a few elements essential to establishing the context for this study. The first part of the paper focuses on the sources of the Crown's fiduciary obligations to the Aboriginal peoples of Canada — and, in particular, to Aboriginal peoples in Quebec — under current constitutional arrangements. The second part deals with the general nature of the obligations, concentrating on an analysis of the obligations with respect to the right of Aboriginal self-government and Aboriginal land rights. The final part examines the scope of the fiduciary obligations based on a number of assumptions about an accession to sovereignty by Quebec.

Fiduciary Relationships

It is now well established that there is a fiduciary relationship between the federal Crown and the Aboriginal peoples of Canada.[1] This

relationship is fiduciary or trust-like rather than adversarial in nature.[2] However, not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation.[3] It is the nature of the relationship between the parties, not their status, that defines the scope and the limits of the obligations it imposes.

The fiduciary relationship results in part from the concept of Native, Aboriginal or Indian title.[4] The government has a responsibility to protect the interests of Indian peoples because of the special fiduciary relationship created by history, treaties and legislation.[5] Under certain conditions, this *sui generis* relationship results in fiduciary obligations that impose limits on the exercise of sovereign power.[6]

The distinctive feature of a fiduciary relationship lies in the fact that the parties find themselves in a legal situation where one party is at the mercy of the unilateral exercise, by the other party, of a discretionary power that can affect the beneficiary's legal or practical interests.[7]

Fiduciary obligations are obligations in equity that are enforceable in law. The existence of this obligation is mainly a question of fact, and a breach of it will give rise to a claim for relief.[8] Strictly speaking, this obligation is not a public law obligation or a private law trust.[9]

A fiduciary obligation can be created in the context of both unilateral actions by the Crown (legislative, administrative or other) and bilateral actions (treaties and other agreements). Although it may be possible for the Crown to terminate a fiduciary obligation by way of an agreement with Aboriginal peoples, it cannot do so unilaterally.

A New Paradigm

The recent recognition of the fiduciary relationship by Canadian courts requires us to examine the historical relationship between the Crown and Aboriginal peoples in this new light. Earlier historical and legal research does not reflect this new perspective.

We cannot, in the context of this paper, provide a complete picture of the concept of the Crown's fiduciary obligations. First, recognition of the concept of legally enforceable fiduciary obligations is a major change in the Supreme Court of Canada's interpretation of the Crown's obligations to Aboriginal peoples. It is therefore too soon to assess all the effects of this recognition. Second, this change will oblige legal experts and others to re-examine historical documents and government actions in light of this new legal reality. Finally, our mandate is limited to examining the federal Crown's fiduciary obligations in the context of Quebec's accession to sovereignty. We have therefore confined ourselves to this topic, although we are aware that it does not cover the entire scope – real or potential – of these obligations. For example, relocations of Inuit from northern Quebec to the high Arctic in the 1950s could involve the federal government's fiduciary obligations. The relocations and the conditions under which they were carried out could constitute a breach of the federal government's fiduciary obligations to the relocated Inuit, particularly given its exclusive constitutional jurisdiction over them. However, such a discussion is beyond the scope of this paper.

Varied Scope

The federal Crown's fiduciary obligations to Aboriginal peoples are by nature the same throughout Canada. The extent and scope of the

obligations are not identical, however, with respect to all Aboriginal peoples or in all parts of Canada. We will see, for example, that one source of a fiduciary obligation applies only to Indian peoples. Another source applies only to Aboriginal peoples within a given area, such as Quebec or Ontario. Finally, another source applies to all Aboriginal peoples, including Indian peoples, Inuit and Métis people.

American and Canadian Precedents

The Supreme Court of Canada's first decision on the Crown's fiduciary obligations, *Guerin*, was rendered a year after the 1983 judgement of the United States Supreme Court in *Mitchell* II.[10] In *Mitchell* II, the U.S. Supreme Court for the first time awarded damages for a breach of fiduciary obligation by the U.S. government. The Court held that there is a fiduciary relationship between the United States and Indian tribes that creates a fiduciary obligation on the part of the government, thus obliging it to compensate the Indians if they prove the obligation was breached. The similarity between the facts in *Mitchell* and those in *Guerin*, and between the judgements of the supreme court of each country, is striking. This was not a unique occurrence, however, as the Supreme Court of Canada has sometimes referred to historical decisions of the U.S. Supreme Court on Aboriginal issues and continues to do so.

PART I
The Fiduciary Obligation

Major Sources in Canadian Law (Dupuis/McNeil)

Since Canadian courts have recognized only recently that the federal Crown has fiduciary obligations to Aboriginal peoples, it is impossible

to provide an exhaustive list of the sources of the obligations. Moreover, insufficient time has passed to allow us to identify definitive principles regarding the obligations. The few authoritative statements that exist need to be clarified, leading to a better delimitation of the concept of fiduciary obligations over the next few decades. The scope of the sources of the obligations will then be better defined.

The principles we identify in this paper must therefore not be taken as settled. The passage of time will help determine the legal consequences of recognizing the federal Crown's fiduciary obligations, and we can anticipate that Parliament and the courts will try to delineate them.

The same is true of the sources of the obligations. We undertook our analysis in this spirit. We do not claim to provide an exhaustive list of sources or to establish definitive categories of sources. The hierarchy among the various sources of the obligations has not yet been established; it is therefore difficult at this stage to group them in well defined categories.

We referred to the following sources: the Canadian constitution, historical and present-day legislation and regulations, court decisions, and treaties (pre- and post-Confederation) between the Crown and Aboriginal peoples.[11]

Since the fiduciary obligations are based on the historical relationship between the Crown and Aboriginal peoples, in presenting the sources we have roughly followed the evolution of legal regimes in Canada, starting with the establishment of ties between Europeans and Aboriginal peoples. The paper is limited to identifying some of the sources of the Crown's fiduciary obligations; a more thorough analysis of each source, though needed, is beyond the scope of the paper.

Although our study concerned the federal Crown's fiduciary obligations in the context of Quebec's accession to sovereignty, most of the sources identified do not apply only to Quebec.

For purposes of the paper, we identified nine sources that could create fiduciary obligations to Aboriginal peoples in Quebec on the part of the federal Crown: (1) the Treaty of Utrecht (1713); (2) the Capitulation of Montreal (1760); (3) the *Royal Proclamation of 1763*; (4) historical treaties; (5) section 91(24) of the *Constitution Act. 1867*; (6) the *Rupert's Land and the North-Western Territory Order* (1870) and the Joint Address of the Parliament of Canada (1869); (7) legislation concerning Quebec's boundaries (1898 and 1912); (8) the James Bay and Northern Quebec Agreement and the relevant implementing legislation; and (9) the *Constitution Act, 1982*. Other sources of fiduciary obligations to Aboriginal peoples, such as the *Indian Act*, are not discussed directly.

The Treaty of Utrecht (1713) (Dupuis)

Although not previously considered in this light, the Treaty of Utrecht could represent an expression of the historical relationship between the Crown and Aboriginal peoples that is the basis for fiduciary obligations.

Signed on 16 April 1713, the treaty ended the War of Spanish Succession. In the treaty France restored to Great Britain "the bay and straits, of Hudson, together with all lands, seas, sea coasts, rivers, and places situate in the said bay and straits, and which belong thereunto" (article X). Great Britain and France then agreed to name "commissaries" who were to determine the limits between Hudson Bay and the places belonging to France.

France also surrendered Acadia, with its ancient boundaries, as well as the island of Newfoundland with the adjacent islands, except Cape Breton and the other islands in the mouth and gulf of the St. Lawrence (articles XII and XIII).

Article XV of the treaty provides as follows:

> The subjects of France inhabiting Canada and others shall hereafter give no hindrance or molestation to the 5 nations or cantons of Indians, subject to the dominion of Great Britain, nor to the other natives of America, who are friends to the same. In like manner the subjects of Great Britain shall behave themselves peaceably towards the Americans, who are subjects or friends to France... But it is to be exactly and distinctly settled by Commissaries, who are and who ought to be accounted the subjects and friends of Britain or of France.[12]

On 30 April 1713, in a letter sent a few days after the Treaty of Utrecht was signed, the French minister of the navy, the Comte de Pontchartrain, urged the governor of New France, Philippe de Rigaud de Vaudreuil, to find the means to persuade the *habitants* and Indians of Acadia to withdraw to Cape Breton, since the provisions of the Treaty of 1713 gave the subjects of His Majesty the possibility of withdrawing from those colonies that were to be transferred or restored to the British.

> Since I am convinced that the *habitants* of Acadia will not have sworn an oath to the Queen of England, they may withdraw under the terms agreed upon, without the English being able to prevent them and I do not doubt that they will gladly take the opportunity to move to Cape Breton. It is necessary that you seek the means to persuade them to do so, as well as the Indians of Acadia.[13] [translation]

Article XV of this treaty between France and Great Britain could be interpreted as one of the first formal expressions, in an international treaty, of the Aboriginal peoples' special status for both the French and British, in relation to their respective claims to sovereignty over these

lands. It is also interesting to note that both sides refer to two types of Aboriginal nations: friends, and subjects of the Crown.

This special status is the result of the factual, if not legal, position occupied historically by Aboriginal peoples in Canada. At the time, the Europeans needed alliances with Aboriginal peoples to establish their own sovereignty in North America. This position was the mainspring of the special historical relationship of successive Crowns with Aboriginal peoples. The Crown's fiduciary obligations are a product of this historical relationship.

The Treaty of Utrecht was concluded 50 years before the *Royal Proclamation of 1763*, which restates some of its terms. It is thus possible to conclude that article XV of the treaty constitutes, if not a direct source of fiduciary obligations, at least a formal expression of the special historical relationship that gives rise to the federal Crown's fiduciary obligations.

The Articles of Capitulation of Montreal (1760) (Dupuis)

The Articles of Capitulation of Montreal, signed on 8 September 1760, confirmed the victory of Great Britain over France in Canada. They were preceded one year earlier by the Capitulation of Quebec, which followed the victory of the British army over the French army at the Battle of the Plains of Abraham. The Articles of Capitulation of Quebec, signed on 18 September 1759, gave the British control over Quebec City and the surrounding region; the 11 articles make no specific mention of Aboriginal peoples.

The Capitulation of Montreal marked the definitive defeat of France in North America, confirmed in the Treaty of Paris of 10 February 1763.

The Articles of Capitulation of Montreal – signed by General Amherst, commander in chief of the British troops, and the Marquis de Vaudreuil, the French governor of Canada – contain 55 articles expressing the conditions negotiated by the French and accepted by the British.[14]

Articles 9, 40 and 51 deal with the "Indians". First, the British refused to undertake to send home Indians who had been members of their army, since they felt that these Aboriginal troops had not behaved cruelly toward the French.

Then, article 40 grants the request of the French that the Indians who were allies of France "be maintained in the lands they occupy if they wish to remain there; they shall not be disturbed on any pretext whatever for having taken arms and served France". Provision is also made to ensure that, like the French, they had freedom of religion (Catholic) and could keep their missionaries.

Finally, General Amherst agreed, in article 51, to ensure that the Indians, if any remained there after the surrender of Montreal, would not molest the French.

Speculation on the scope of article 40 continues to this day. Does it have the effect of creating rights, perpetuating rights recognized earlier by the French, or recognizing and affirming pre-existing rights? In the *Sioui* decision (1990), the Supreme Court of Canada answered this question in part. Speaking for the Court, Mr. Justice Lamer was of the opinion that

> the article can only be interpreted as a condition on which the French agreed to capitulate... Further I think it is clear that the purpose of art. 40 was to assure the Indians of certain rights, not to extinguish existing rights.[15]

Article 40 of the Articles of Capitulation of Montreal appears to contain at least an undertaking by Great Britain not to dispossess Indians who had been allies of the French of the lands they occupied in 1760. Does this undertaking, which applied beyond both the historical and the present-day boundaries of Quebec, create an obligation on the part of the British Crown to the Aboriginal peoples who were allies of France? Is this obligation a fiduciary one? If so, is it a general obligation to protect the Aboriginal peoples or a specific fiduciary obligation? Which peoples are the former Aboriginal allies of France to whom the obligation is owed? According to the Supreme Court of Canada in *Sioui*, the Hurons at least were not in this category, because they gave up their alliance with France at the time of the capitulation of Montreal, as we will see in our examination of the Murray treaty (1760). Would the obligation give Aboriginal peoples recourse if the Crown breached it? These questions are all unresolved and merit an analysis that is beyond the scope of this paper.

The Royal Proclamation of 1763 (Dupuis)

The Treaty of Paris, signed on 10 February 1763, officially confirmed France's recognition of British conquest of its possessions in North America.

> The end of an era, the beginning of an era: such is the significance of the year 1763... the proclamation is one of the important state papers of the 18th century. It stands at the beginning of that new era, which was to see the reorganization of Canada under the new government, the separation of the American colonies from the mother country, the occupation of the west by Anglo-Saxons.[16]

This treaty of peace and alliance between Great Britain, France, Spain and Portugal ended the Seven Years War. Among other treaty

provisions, France renounced its claim to the whole of Acadia, Cape Breton and Canada. Practically nothing remained of its empire in North America, since it had already ceded Louisiana to Spain.

Article 4 of the treaty defines the nature and extent of this surrender by France, which

> cedes and guaranties to his said Britannick Majesty, in full right, Canada, with all its dependencies...with the sovereignty, property, possession, and all rights acquired by treaty, or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, lands, islands, places, coasts and their inhabitants, so that the Most Christian King cedes and makes over to the said King and to the Crown of Great Britain, and that in the most ample manner and form, without restriction...[17]

The pressure exerted by Indian peoples, especially Pontiac's uprising against British authorities, appears to have led King George III to issue an edict concerning the organization of civil government in his new territories – the *Royal Proclamation of 7 October 1763*.[18]

Under the proclamation, the territory that made up Canada under the French regime was considerably reduced: the Ohio Valley was cut off, as were the upcountry areas, Lake Champlain, the Island of Anticosti and Labrador. The new colony was named the colony of Quebec, and its new boundaries were defined in the proclamation.

The *Royal Proclamation of 1763* is not a statute but an edict issued under British executive authority. It was revoked in part by section 4 of the *Quebec Act* of 1774.[19] However, section 3 of the *Quebec Act* provided explicitly that nothing in the act was to extend, nullify, vary or alter any right, title or possession, however derived, and that, in consequence, these rights, titles and possessions were to remain in force as if the act had not been passed.

The Canadian constitution refers to the proclamation in section 25 of the *Canadian Charter of Rights and Freedoms*, which states that the Charter does not abrogate or derogate from any rights of Aboriginal peoples recognized by the Royal Proclamation.[20] As well, Gwynne J. (dissenting) described the proclamation as an "Indian Bill of Rights" in the Supreme Court of Canada decision in *St. Catharines Milling*,[21] and Hall J. restated this in his dissenting judgement in *Calder*.[22]

The text of the *Royal Proclamation of 1763* is dense and deals with very diverse subjects. Certain parts concern the former English colonies, others concern the new colonies, and still others apply to both types of colonies. The proclamation's lack of clarity still causes much confusion and difficulty in interpretation. The question of the application of the proclamation to Quebec territory today is now before the Supreme Court of Canada following two judgements of the Quebec Court of Appeal on the question.[23]

The various parts of the proclamation are not clearly identified. Even its structure gives cause for debate. It can be divided into five parts, each of which begins with a preamble setting out its context.

The first part creates and defines the territory of the four new colonies: Quebec, West Florida, East Florida and Grenada. The second part concerns the organization of civil government in these new colonies. The third part provides for the transfer of land to reformed English soldiers who had served the British Crown during the war that had just ended.

Finally, the fourth and fifth parts deal with the "nations or tribes of Indians". Slattery divides the proclamation into four parts, combining what we have called the fourth and fifth parts.[24] Our division into five parts is based on the style of the preamble used for each new part of the

text. Resolving this issue is not necessary for our purposes and is beyond the scope of the study in any event.

After the following preamble,

> And whereas it is just and reasonable, and essential to our Interest and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...[25]

the fourth part directs that no governor of the new colonies, including Quebec, shall grant a surveying warrant or a patent for lands in the territory located beyond the borders of the colony in question.

Furthermore, the fourth part of the proclamation "reserve[s] under our Sovereignty, Protection and Dominion, for the use of the said Indians", the lands located outside the boundaries of the colony of Quebec in 1763, the territory of Rupert's Land (granted to the Hudson's Bay Company by England in 1670), as well as the lands located west of the source of the rivers that flow into the sea from the west and northwest. It also prohibits the colonists from purchasing or owning "any lands within the country above described" without the prior authorization of government authorities.

The preamble to the fifth part declares a desire to end abuses committed in purchasing lands from the Indians, which had prejudiced England and resulted in dissatisfaction among the Indians. To remedy this situation, the proclamation forbade the purchase from the Indians of the lands reserved for them in the parts of the colonies where the Crown had permitted settlement. It also stated that, should the Indians wish to dispose of such lands, they could in future cede them only to the Crown.

More than 200 years after the proclamation was issued, its interpretation still gives rise to controversy, in particular concerning the nature and extent of the rights in question, their extinguishment or transfer, and the boundaries of the land that was to be reserved for the Indians.

The Commission d'étude sur l'intégrité du territoire du Québec (commission of inquiry into Quebec's territorial integrity) devoted part of its report to this issue, noting the various interpretations of the proclamation over the years.[26]

The justices of the Supreme Court of Canada also expressed opposing views on the application of the proclamation in their 1973 decision in *Calder*.[27] In that case, Judson J. stated that the *Royal Proclamation of 1763* had nothing to do with the issue of Indian title in British Columbia.[28] Hall J., on the other hand, believed that the very wording of the proclamation showed that it was intended to include the lands west of the Rocky Mountains and should consequently apply to British Columbia.[29]

Although Canadian courts have rendered few decisions concerning the application of the proclamation to Quebec, the Supreme Court of Canada nevertheless established in *Sioui* that, as far as the colony of Quebec was concerned, the Royal Proclamation "reserved two types of land for the Indians: that located outside the colony's territorial limits and the establishments authorized by the Crown inside the colony".[30]

In December 1763, royal instructions to Governor Murray supplemented the Royal Proclamation and confirmed its intent, at least the part of it that concerned the relationship to be established with the Indians.[31]

Article 60 of the instructions ordered the governor to treat with the Indians of the province of Quebec, to assure them of the protection and friendship of Great Britain, and to give them presents so as to induce them gradually to become not only good neighbours of the colony's British subjects but also good subjects themselves. This instruction was adopted because the province of Quebec was "in part inhabited and possessed by several Nations and Tribes of Indians, with whom it is both necessary and expedient to cultivate and maintain a strict Friendship and good Correspondence".[32] This article is important in so far as it seems to confirm both that the Crown did not yet consider Aboriginal peoples its subjects at the time and that it intended to maintain a special relationship with these peoples.

The next article restates the terms of the *Royal Proclamation of 1763*, forbidding the governor to molest or disturb the Indians "in the Possession of such Parts of the said Province, as they at present occupy or possess".[33] The article also directed the governor to obtain more information concerning their customs and way of life and the laws and constitutions governing them.

In this way the Crown recognized that Aboriginal peoples at that time were governed by their own laws and constitutions. In so doing, did the Crown assume an obligation to protect the Aboriginal peoples and their form of internal government? Is such an obligation fiduciary in nature, and does it still exist?

Finally, article 62 of the instructions restates the provision of the *Royal Proclamation of 1763* to the effect that British subjects may not purchase land from Indians or possess lands reserved for the various tribes.

These three articles in the instructions to Governor Murray were restated in full in articles 59, 60 and 61 of instructions to Governor Carleton, dated 12 April 1768.[34]

New instructions to Governor Carleton, dated 3 January 1775, were accompanied by a plan for the future management of Indian affairs.[35] In the management plan we find a general prohibition on acquiring land from Indians (article 41). Furthermore, the plan directs, measures should be taken "with the consent and concurrence of the Indians to ascertain and define the precise and exact boundary and limits of the lands, which it may be proper to reserve to them, and where no settlement whatsoever shall be allowed".[36]

These various instructions are in the same spirit as the *Royal Proclamation of 1763* and, at the least, constitute a historical source of the responsibility assumed by the British Crown with respect to Aboriginal peoples. This responsibility is the basis for the Crown's fiduciary obligations.

Historical treaties (Dupuis)

Both France and Great Britain entered into alliances with various Aboriginal nations. We will not deal with the distinction that was made until recently between pre- and post-Confederation treaties or between treaties of 'peace and friendship' and 'land surrender' treaties.

In this section, we will see that the courts have accorded these alliances the status of treaties, with legal effect in Canadian domestic law, while refusing to consider them treaties within the meaning of international law. We do not intend to provide an exhaustive list of such alliances, but we discuss three examples that illustrate the recent trend toward judicial re-examination of historical treaties from a new

perspective. Among other issues, this re-examination will determine whether the treaties are a source of fiduciary obligations on the part of the Crown.

In its decision in *Sparrow*, the Supreme Court of Canada established a general guiding principle for interpreting section 35(1) of the *Constitution Act, 1982* – that the government has a responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The decision in *Sparrow* concerned an Aboriginal right, but section 35(1) protects both Aboriginal rights and treaty rights, and the Supreme Court of Canada gave no indication that principle of interpretation related only to Aboriginal rights. There is every reason to believe that the Court would also apply it to treaty rights.

To the extent that the historical alliances are considered treaties, then, the rights they create could be protected under section 35(1). Aboriginal parties to these treaties could therefore call on the Crown to fulfil its fiduciary obligations, for example, to have legislation struck down that encroached on a right created by such a treaty. It is still too soon to assess what scope the courts intend to give their principle for interpreting section 35(1) and how they will apply it to this type of treaty or alliance.

The Peace of Montreal (1701) (Dupuis)

The Peace of Montreal, signed in that city on 4 August 1701, put an end to almost 100 years of war between France and the Iroquois. The event brought together representatives of New France, thirty or so Aboriginal nations that were allied with France, and the Five Nations.[37]

This multilateral peace agreement was preceded in the seventeenth century by various attempts at peace between the French and the Iroquois, although these did not last. For example, the French and their Huron, Montagnais and Algonquin allies concluded an agreement with the Agniers in 1645 at Trois-Rivières. In 1653 the Five Nations obtained an undertaking from the French at the conference in Montreal to remain neutral in case of war between the Iroquois on one hand and the Montagnais and the Algonquins on the other. In 1684 the military defeat of the French, led by Antoine le Febvre de la Barre, by the Tsonnontouans led to a peace agreement between the Iroquois and the French at Anse-de-la-Famine.

The Five Nations also signed a peace treaty with Great Britain at the Albany Conference in July 1701. Then, in the summer of 1701, 1300 delegates, representing some 38 nations, travelled to Montreal to conclude the peace treaty signed on August 4. In addition to the Five Nations, the upcountry nations – bringing together about 30 nations that were allied with the French – were also represented. These upcountry nations included the Hurons, the Outaouais, the Miamis, the Crees, the Nipissings and the Illinois.[38]

In the Quebec Court of Appeal's recent judgement in *Adams*, which concerned the Aboriginal rights of the Mohawks, Rothman J., dissenting, wrote as follows about the Peace of Montreal:

> It was not until 1701, with a formal peace treaty between the Five Nations of the Iroquois Confederacy and the French and their Indian allies, that the Iroquois wars ended. They had been at war intermittently for almost 100 years. It is, I think, not unreasonable to conclude that the peace treaty itself was a form of tacit recognition of the independent status of the Mohawks and the importance of their role.[39]

Although the issue in *Adams* did not depend on the characterization of the Peace of Montreal, and although Rothman's was a dissenting judgement, the fact remains that he gave the text the status of a formal treaty and even interpreted it as tacit evidence of recognition of the independent status of the Mohawks at the time the treaty was signed. Although the Supreme Court of Canada does not have to rule on this question in the appeal of *Adams*, the question of the Crown's fiduciary obligations in relation to the protection of rights created by this treaty could arise at some point.

The Agreement of Swegatchy (1760) (Dupuis)

In another recent judgement, *Côté*, the Quebec Court of Appeal recognized an agreement between the Crown and the Aboriginal peoples of Quebec, including the Algonquins, as a treaty.[40] This agreement was apparently concluded at Swegatchy in August 1760 between Sir William Johnson, superintendent general of Indian Affairs for Britain at the time, and the Confederation of the Seven Nations of Canada.

There is no written trace of the Agreement of Swegatchy, which was apparently confirmed at Caughnawaga in September of the same year. However, as evidence of the existence of this treaty, the court accepted a report on a later meeting at Sault Saint-Louis on 21 August 1769.

The Agreement of Swegatchy was concluded at a time when the French and the British were still fighting for control of Canada. After the capitulation of Quebec less than a year earlier, the next goal was control of Montreal. The Agreement of Swegatchy occurred barely a month before the capitulation of Montreal. The British concluded this

alliance with the Indian nations that were allied with France to guarantee at least their neutrality, if not their co-operation.

Relying on the liberal interpretation mandated by *Sioui*, Beaudoin J. concluded in *Côté* that

> There was indeed an actual agreement between the British authorities and the ancestors of the appellants at Swegatchy and, given the tests prescribed by the Supreme Court, this agreement seems to me, on the one hand, to be proved and, on the other hand, to constitute a real treaty within the meaning given to this expression by the highest court in our country.[41] [translation]

Unlike the case involving the Peace of Montreal, the characterization of this agreement is at the heart of *Côté*, and the issue will be considered by the Supreme Court of Canada, which has granted leave to appeal the judgement. Depending on the Supreme Court's characterization, the issue of the Crown's fiduciary obligation to protect the rights created by this treaty may or may not arise.

The Murray Treaty (1760) (Dupuis)

In 1990, the Supreme Court of Canada recognized a document signed by General Murray, representing the British Crown, on 5 September 1760, a few days before the capitulation of Montreal, as a treaty within the meaning of section 88 of the *Indian Act*.[42]

We saw earlier that at that time, France and Britain had been at war for more than four years. The war was to end with the defeat of the French, confirmed by the Treaty of Paris on 10 February 1763. The signature of the treaty by General Murray thus preceded the definitive surrender of the French by a few days. It was therefore signed when Great Britain did not yet exercise sovereignty over Canada.

Applying the broad and liberal rule of interpretation in categorizing and analyzing this document, the Supreme Court reasoned that the Hurons could reasonably have believed that General Murray had the power to sign a binding treaty. France had signed earlier alliances with the Hurons to which the Hurons clearly did not feel bound when they agreed to become allies of the British on 5 September 1760. According to the Court, in this respect there was no basis for the Hurons to distinguish between the two European states, whose sole purpose was to control the territory by force. The fact that the Hurons did not sign the document dated 5 September 1760 does not prevent it from being a bilateral instrument. The Indians were a real threat at that time to both the French and the British.

> The *sui generis* situation in which the Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties", regardless of the strict meaning given to that word then and now by international law.[43]

According to the Court, the existence of agreements between the French and the British, like the Articles of Capitulation of Montreal (1760), did not prevent the signing of independent agreements between the British and Indian nations, independently of whether they were allies of the British or the French.

Relying on its earlier decision in *Simon*,[44] the Supreme Court held that the document signed by General Murray contained the three elements required for it to constitute a treaty: (1) an intention to create obligations; (2) the existence of mutual obligations; and (3) a certain element of solemnity.

Because neither the historical documents nor legislative or administrative history show a clear and express intention to extinguish this treaty, it is still valid today, even if the Hurons did not invoke it until the events leading to the *Sioui* decision. It should be noted that the Supreme Court characterized this agreement as a treaty within the meaning of the *Indian Act*. At the appellants' request, it did not rule on whether the agreement is a treaty within the meaning of section 35 of the *Constitution Act, 1982*.

According to the Court, the purpose of section 88 of the *Indian Act*, which provides for the application of provincial statutes to Indians under certain conditions, is precisely to protect Indians from any provincial statute whose purpose is to abrogate a treaty-protected right. In the conflict between the Crown's title to the land and the right of the Hurons to exercise their treaty-guaranteed rights (the right to practise their religion and their ancestral customs), the Court concluded that there is no incompatibility between the exercise of the Hurons' rights and the occupation of the land by the Crown. Consequently, Quebec provincial statutes could not in this instance be invoked against the Hurons, because the Crown could not prove that "its occupation of the land cannot accommodate the reasonable exercise of Hurons' rights".[45]

In summary, the historical alliances between successive Crowns and Aboriginal peoples are now being analyzed in a new light. They are being given the status of treaties, which are considered one form of the special historical relationship between the Crown and Aboriginal peoples. It is thus to be expected that the question of whether these alliances create fiduciary obligations on the part of the Crown will arise.

The Constitution Act, 1867 (McNeil)

The *Constitution Act, 1867* provided for the unification of the provinces of Canada, Nova Scotia and New Brunswick into the Dominion of Canada, a self-governing dominion of the British Empire.[46] The Province of Canada was divided into Quebec and Ontario, formerly Lower and Upper Canada. Legislative powers over domestic matters were distributed between Parliament and the provincial legislatures, primarily by sections 91 and 92 of the act.[47] Section 91(24) gave the Parliament of Canada exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians", from which matching executive authority flows.[48] Control over Canada's foreign affairs was retained by the imperial Crown, which exercised this control through the British government as part of the royal prerogative. This power over foreign affairs was gradually relinquished to the Canadian government, especially in the post-First World War period when the British Empire became the British Commonwealth.[49]

The fact that jurisdiction over Indians[50] and their reserved lands[51] was granted to the Parliament of Canada in 1867, while control over foreign affairs was retained by the British government, reveals that Aboriginal affairs were regarded as primarily a domestic Canadian matter by the British legislators who enacted the *Constitution Act, 1867*.[52] In other words, the Aboriginal nations inhabiting the territories contained within the new Dominion of Canada were not considered to be foreign nations.[53] This view was not necessarily shared by the Aboriginal nations, who were not consulted and did not consent to the creation of Canada.[54] At the time, and consistently ever since, some of them have regarded themselves as independent nations whose relations with the Crown are nation-to-nation relations of allies.[55]

Although Britain and Canada thought that the Aboriginal nations within Canada[56] were under Canadian jurisdiction by virtue of section 91(24), this does not mean that the authority of those nations to govern themselves had been taken away. Their capacity to enter into relations with foreign nations may have been curtailed, but arguably they retained control over their own internal affairs to the extent that Canada did not interfere through the exercise of its jurisdiction under section 91(24).[57]

Before Confederation, jurisdiction over Indian affairs was exercised by the legislature of the Province of Canada, under the paramount jurisdiction of the British Parliament.[58] When legislative jurisdiction was distributed between the Parliament of Canada and the provincial legislatures in 1867, the assignment of authority over Indian affairs to Parliament would not have changed the nature of the relationship between the Crown and Aboriginal peoples. The fiduciary obligations created by the process of colonization and expressed in the Treaty of Utrecht, the Capitulation of Montreal, the *Royal Proclamation of 1763*, and the historical treaties simply continued. However, primary responsibility for meeting those obligations shifted from the Province of Canada to a new entity, the Canadian government.[59] However, as the fiduciary obligations are on the Crown in all its capacities, any government acting on behalf of the Crown is bound by these obligations. This would include not only the Canadian government, but also the provincial governments and, at least until the enactment of the *Statute of Westminster*[60] in 1931, the British government.[61]

As a legal matter, it appears that fiduciary obligations to Aboriginal peoples were enforceable only against the executive branches of those governments, not against the legislative branches.[62] This is because the doctrine of parliamentary sovereignty (or supremacy)

prevents the courts from questioning the validity of legislation enacted by a legislature within its constitutional jurisdiction.[63] A legislature, and hence the Crown when it assented to legislation violating Aboriginal or treaty rights, might have been in breach of its fiduciary obligations, but the courts would have been unable to interfere.[64] As we will see, however, this changed when the *Constitution Act, 1982* was enacted.

In summary, Confederation and the assignment to Parliament of legislative jurisdiction over "Indians, and Lands reserved for the Indians" did not alter the nature of the Crown's fiduciary obligations to Aboriginal peoples. Those obligations continued, but primary responsibility for meeting them now rested on the Canadian government.[65]

The Rupert's Land and North-Western Territory Order (1870) (McNeil)
The Canada created by the *Constitution Act, 1867* was not the Canada of today. As we have seen, it consisted of only four provinces, and two of those provinces – Quebec and Ontario – were much smaller than they are now. However, the act did provide in section 146 for the expansion of Canada by the admission of new provinces and territories, including Rupert's Land and the North-Western Territory. Rupert's Land was the name given to the territory granted to the Hudson's Bay Company (HBC) in 1670 by a royal charter issued by Charles II.[66]

In the HBC's view, Rupert's Land included all the lands draining into Hudson Bay and Hudson Strait, a vast territory covering what is now Manitoba, part of Alberta, Saskatchewan and the Northwest Territories, as well as the portions of present-day Quebec and Ontario that lie north of the height of land between the Hudson Bay and St.

Lawrence/Great Lakes watersheds.[67] However, the extent of Rupert's Land is a matter of serious controversy that has never been resolved satisfactorily.[68] While there was no dispute between the Hudson's Bay Company and Canada that the south-eastern boundary coincided with the north-western boundaries of Quebec and Ontario in 1867, the contention of the HBC that the boundary was located along the height of land was hotly contested both before and after Confederation. This controversy was resolved only partially by a decision of the Privy Council in 1884, which located a portion of Ontario's boundary north of the height of land.[69] Moreover, it can be argued that the 1670 charter gave the HBC only a right to acquire sovereignty for the Crown and lands for itself by taking possession and control of the territory within charter's limits. In this view, the extent of Rupert's Land would be limited to territory the HBC effectively occupied and controlled and would not include territory that was still occupied and controlled by Aboriginal nations.[70] As for the North-Western Territory, it appears to have consisted of any territory north and west of Rupert's Land over which the Crown had acquired sovereignty but that was not part of British Columbia.[71]

As provided for by section 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868*,[72] Rupert's Land and the North-Western Territory were transferred to Canada by the *Rupert's Land and North-Western Territory Order*[73] (referred to hereafter as the *Rupert's Land Order*) on 15 July 1870.[74] That imperial order in council, which was requested by joint addresses of the Senate and House of Commons of Canada, as required by section 146, is part of the Canadian constitution.[75] As such, it could not be amended or repealed in Canada before the enactment of the *Constitution Act, 1982*, and since that time

can be amended or repealed only in accordance with the amending formula contained in that act.[76]

The 1870 order transferred Rupert's Land to Canada on terms and conditions contained in a joint address of the Canadian Parliament adopted in May 1869.[77] Two of those terms and conditions are relevant to the relationship between the government of Canada and the Aboriginal peoples in Rupert's Land. The first of these became term 14 of the order itself, providing that

> 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian government in communication with the Imperial government; and the Company shall be relieved of all responsibility in respect of them.

This provision acknowledged that the "Indians"[78] had land claims in Rupert's Land before the transfer and shifted responsibility for settling those claims from the Hudson's Bay Company to the government of Canada.[79] Moreover, given the constitutional nature of the *Rupert's Land Order*, that obligation would be binding on the Parliament of Canada as well. The requirement of consultation with the British government, while initially maintaining a role for the imperial Crown, has no doubt lapsed, possibly with the enactment of the *Statute of Westminster* in 1931, and certainly with the patriation of the Canadian constitution in 1982.[80]

The second relevant term of the 1869 joint address provides

> That upon the transference of the territories in question to the Canadian government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer.[81]

Although not included in the terms of the *Rupert's Land Order* itself, this provision (which we will call the 'protection provision') was

approved by Her Majesty along with the other terms and conditions of the 1869 address.[82] It should therefore be binding not only on the government of Canada, but also on the Parliament of Canada.[83]

This undertaking by Parliament "to make adequate provision for the protection of the Indian tribes" imposes a constitutional "duty" that would appear to be fiduciary in nature. As we have seen, Parliament has the power under section 91(24) of the *Constitution Act, 1867* to enact legislation relating to Indians and their reserved lands, but this power is restricted in so far as the Indians of Rupert's Land are concerned. Section 91(24) and the protection provision together create a situation where "federal power must be reconciled with federal duty".[84] Those words of the Supreme Court of Canada refer to the relationship between section 91(24) and section 35(1) of the *Constitution Act, 1982*, but the parallel is obvious: in each case, the jurisdiction of Parliament is restricted by fiduciary obligations that are constitutionally binding.[85]

The duty imposed by the protection provision is owed to the "Indian tribes". Canada is obliged to safeguard the tribes' "interests and well-being", which must include protecting their lands and livelihoods as well as their physical existence from the potentially harmful effects of European settlement in Rupert's Land.[86] But the interests of the tribes can be interpreted as extending as well to preservation of their cultures and maintenance of their semi-autonomous political status.[87] This broad interpretation of the word "interests" is supported by numerous Supreme Court of Canada decisions that have held that treaties and statutes should be given a broad and liberal interpretation in favour of the Aboriginal peoples affected by them.[88]

The *Rupert's Land Order* therefore placed a twofold obligation on Canada with respect to the Aboriginal peoples in Rupert's Land. The

first was an obligation on the government of Canada to settle their land claims, just as Canada was obliged to settle Aboriginal land claims elsewhere in accordance with the *Royal Proclamation of 1763*. Second, the government, in both its legislative and executive capacities, undertook a protective role over the Indian tribes as collectivities with communal interests. Both these obligations are constitutional and, as such, are linked closely to the fiduciary obligations that were constitutionalized by section 35 of the *Constitution Act, 1982*. But before discussing section 35, we need to examine the impact on these obligations of the annexation of part of Rupert's Land to Quebec and of settlement of Aboriginal land claims in the annexed territory.

The Quebec boundary acts (1898 and 1912) (McNeil)

The location of Quebec's northern boundary at the time of Confederation was uncertain. To resolve this question of the location of the boundary between federal territory (which was then part of the Northwest Territories[89]) and Quebec, it was agreed in 1898 that Canada and Quebec would enact concurrent statutes[90] setting the boundary along the eastern shore of James Bay to the mouth of the Eastmain River, up that river to the most northerly point of Patamisk Lake, then due east to the Hamilton River and down that river to the western boundary of Labrador.[91] It must be emphasized that this boundary was the result of a political accord, put into effect by legislation. Whether it corresponded with the legal boundary of Quebec before the enactment of the 1898 statutes has never been determined.[92] Moreover, to the extent that the 1898 statutes purported to include territory in Quebec that was not part of Canada at the time, they would have been invalid.[93]

As a result of a further agreement, Canada consented in 1912 to extend the northern boundary of Quebec from the 1898 line to its present location along Hudson Bay and Hudson Strait to the western boundary of Labrador.[94] This agreement was also implemented by concurrent Canadian and Quebec statutes.[95] Although it was assumed at the time that all the territory added to Quebec by the 1912 statutes had previously been part of Rupert's Land, we have seen that this assumption can be challenged to the extent that the Hudson's Bay Company was not in effective occupation and control before the transfer of Rupert's Land to Canada in 1870.[96]

The 1912 statutes contained the following specific conditions relating to the Aboriginal peoples living in the territory Quebec acquired:

> 2. (c) That the province of Quebec will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;
>
> (d) That no such surrender shall be made or obtained except with the approval of the Governor in Council;
>
> (e) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the government of Canada subject to the control of Parliament.

Section 2(c) apparently had a dual purpose. First, it ensured that the land rights of the Aboriginal peoples within the part of Rupert's Land being transferred to Quebec would continue to be protected, as they were by term 14 of the *Rupert's Land Order*. Second, it attempted to shift responsibility for settling Aboriginal land claims from the federal government to the government of Quebec. The federal

government obviously wanted to avoid the situation it had been placed in by decisions of the Privy Council, whereby it bore the cost of settling land claims within provincial boundaries while the provinces reaped the benefits by having provincial Crown lands freed of the burden of Aboriginal title.[97]

From a constitutional perspective, section 2(c) is problematic. Term 14 of the *Rupert's Land Order* placed responsibility for settling Aboriginal land claims on the government of Canada. Canada could not escape that constitutional responsibility by attempting to shift it entirely to the province of Quebec. Moreover, it is questionable whether section 91(24) of the *Constitution Act, 1867* allows the federal government to delegate responsibility for settling these claims to the provinces.[98] Perhaps Canada believed it had dealt with this problem by retaining a supervisory role in the requirement in section 2(d) that surrenders negotiated by the province be approved by the governor in council.

With respect to the interpretation of section 2(c), the term "Indian inhabitants" no doubt includes the Inuit living in the northern part of the transferred territory.[99] The section acknowledges that Canada had previously recognized that those inhabitants have rights, which must refer to the recognition in the 1869 Joint Address of the Canadian Parliament, the terms of which were approved by Her Majesty and given constitutional force by the *Rupert's Land Order*. As we have seen, that recognition not only extended to land rights but also included protection of the interests and well-being of the Aboriginal peoples as semi-autonomous nations.[100] So by providing that "the province of Quebec will recognize the rights of the Indian inhabitants in the territory", section 2(c) required that Quebec respect those rights to the same extent that Canada was obliged to respect them.

However, the extent to which Quebec could deal with those rights is limited by sections 2(c) and 2(e). Section 2(c) provides that Quebec "will obtain surrenders of such rights in the same manner, as the government of Canada has heretofore...obtained surrender thereof". As Canada had not entered into any agreements for the surrender of the rights of the Aboriginal peoples in the territory involved in the 1912 boundary extension, this provision must refer to surrenders that Canada had obtained previously in other parts of the territory thought to be covered by the *Rupert's Land Order*, that is, the numbered treaties signed within Rupert's Land in the period between 1870 and 1912.[101] Those treaties involved the surrender of land rights in exchange for other rights and benefits but did not provide for the surrender of governmental powers by the Aboriginal peoples who signed them.[102] For this reason, section 2(c) gave Quebec only limited authority to negotiate land surrenders along the lines of the earlier numbered treaties; it did not authorize Quebec to deal with Aboriginal rights, such as rights of self-government, that were not dealt with in those treaties. In negotiating land surrenders, Quebec would be subject to the same fiduciary obligations as Canada. Neither the Crown nor Parliament could escape its fiduciary obligations, which were constitutionally entrenched by the *Rupert's Land Order*, by enacting legislation to transfer primary responsibility for settling land claims from the federal to a provincial government.

This interpretation of section 2(c) is supported by section 2(e), which, as we have seen, provides that "the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the government of Canada subject to the control of Parliament." To the extent that this provision affirms

federal jurisdiction under section 91(24) of the *Constitution Act, 1867* and federal responsibility under the *Rupert's Land Order*, it is merely declaratory. This is confirmed by the words "shall remain". The use of the term "trusteeship" is especially significant in this context, as it reveals an understanding on the part of Parliament that the Crown has trust-like obligations to Aboriginal peoples, primary responsibility for which is placed on the federal government, no doubt by section 91(24) and the *Rupert's Land Order*.

To the extent that the territory added to Quebec in 1912 was already part of Canada,[103] authority for the extension of Quebec's boundaries can be found in section 3 of the *Constitution Act, 1871*,[104] which provides that

> 3. The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature...

Once the boundary extension acts were enacted, however, it would not be possible for either Parliament or the Quebec Assembly unilaterally to alter the agreement implemented by those acts (by amending or repealing its own legislation), as that would violate the spirit and intent, if not the actual terms, of section 3. In that sense, the boundary extension acts are 'constitutional', as the Supreme Court of Canada described them in the *Sparrow* decision.[105] Concurrent enactments by Canada and Quebec could, however, repeal or amend those acts. This in fact was done in 1977, when sections 2(c), (d) and (e) were repealed by the legislation implementing the James Bay and Northern Quebec Agreement, discussed later in this paper.[106] However, in light of section 91(24) of the *Constitution Act, 1867* and of

the fiduciary aspect of the *Rupert's Land Order*, this repeal is probably of little significance.[107]

In conclusion, the Quebec boundary acts of 1898 and 1912 did not affect the nature of the fiduciary obligations which Canada owed to the Aboriginal peoples. In any territory that may have been added to Quebec by the 1898 acts, Canada's obligations would simply have continued, given their constitutional status arising from section 91(24) of the *Constitution Act, 1867* and the *Rupert's Land Order*. Similarly, in the territory given to Quebec in 1912, the same constitutional obligations would have continued to bind Canada. However, assuming that the transfer to Quebec of concurrent authority to settle land claims was constitutional, Quebec also incurred the fiduciary obligations applicable to the negotiation of land claims.

The James Bay and Northern Quebec Agreement and its implementing legislation (Dupuis)

The James Bay and Northern Quebec Agreement (JBNQA) was signed on 11 November 1975. It was the result of an agreement between, on one hand, the government of Canada and the government of Quebec (and the James Bay Energy Corporation, the James Bay Development Corporation and Hydro-Quebec) and, on the other, the Grand Council of the Crees (and the members of eight Cree bands) and the Northern Quebec Inuit Association (and the Inuit of Quebec and the Inuit of Port Burwell).[108]

Paragraph 2.4 of the JBNQA states that it constitutes an out-of-court settlement of legal proceedings, related to the James Bay hydroelectric project, brought by the Association of Quebec Indians against the government of Quebec in 1972.[109] This 455-page

document is divided into 31 chapters and covers a broad range of subjects. The style of the document reveals the context of the negotiations, where the political desire of the parties, sharpened by the pressure of legal proceedings, was to reach a compromise as soon as possible.

Under the JBNQA, the Crees and the Inuit of Quebec were to receive financial compensation of $232.5 million over a period of 21 years in return for surrendering to Quebec their rights over the land. In addition, the agreement provides for the establishment of administrative structures and special programs for the Crees and the Inuit.

The JBNQA was the first land claims agreement concluded after the adoption of the federal land claims policy in 1973. The Northeastern Quebec Agreement (NQA), between all the parties to the JBNQA and the Naskapi Indians of Quebec, was added to it in 1978. This collateral agreement extended the benefits of the JBNQA to the Naskapis. The JBNQA and the NQA are the only agreements of this kind covering lands in Quebec, although other claims related to land in the province are currently being negotiated or discussed.[110] The JBNQA has been amended by 12 additional agreements concluded by the parties between 1975 and 1993.

The federal government's land claims policy was adopted in 1973 in the wake of the *Calder* decision and the lawsuit brought by the Association of Quebec Indians. The policy refers to, among other things, Aboriginal peoples' rights to land based on occupation and use of their traditional lands and the *Royal Proclamation of 1763*, which, according to the government, recognized that Aboriginal peoples had title to the lands they inhabited at the time.[111]

The preamble to the JBNQA revolves around two poles:

1. organization, good government and orderly development of Quebec's northern territory (under the 1898 federal and provincial legislation establishing the province's boundaries and the 1912 statutes extending them);[112] and
2. satisfaction of the obligations assumed by Quebec with respect to the Aboriginal peoples inhabiting this territory and of the terms and conditions of the surrender of rights referred to in the 1912 federal legislation, since the Crees and the Inuit had consented to an agreement to this effect.

We saw earlier that the Hudson's Bay Company returned Rupert's Land to the British Crown, which then transferred it to Canada in 1870. Under sections 2(c), (d) and (e) of the 1912 federal statute, Canada accordingly transferred to Quebec, at least in part, the duty it had under the *Rupert's Land Order* of 1870, which transferred Rupert's Land to Canada.

Section 1 of the 1912 Quebec legislation provides that the provincial legislature agreed to this extension of its boundaries under the terms, conditions and provisions stated in the federal act. In fact, the Quebec statute implements section 4 of the federal legislation, which provided that it was to come into force after the province consented to extend its boundaries and agreed to the terms, conditions and provisions stated there.

Parliament and the Quebec National Assembly gave effect to the JBNQA by enacting the *James Bay and Northern Quebec Native Claims Settlement Act* and the *Act Approving the Agreement Concerning James Bay and Northern Quebec* respectively.[113]

The federal statute implementing the JBNQA, enacted in 1977, states in its preamble that "Parliament and the government of Canada

recognize and affirm a special responsibility for the Crees and Inuit". This modern-day affirmation by the Crown of its special responsibility for the Aboriginal peoples who signed the agreement suggests that the agreement can be considered a source of a fiduciary obligation for the federal Crown.

While implementing the agreement, the statute extinguished "all native claims, rights, title and interests, whatever they may be, in and to the Territory [covered by the agreement] of all Indians and all Inuit" (section 3), whether or not they were signatories of the agreement. It can be asked whether this unilateral extinguishment of the rights of Aboriginal peoples who did not sign the agreement constitutes a violation by Canada of its fiduciary obligations to them, which are based on, among other things, its commitment in the 1912 legislation extending the boundaries of Quebec. Moreover, we have seen that the 1870 *Rupert's Land Order* placed a constitutional obligation on Canada to settle Aboriginal land claims. As this obligation would probably be violated by unilateral extinguishment, it may be that the extinguishment of the land rights of non-signatories is invalid.

Paragraph 2.14 of the JBNQA was adopted specifically to meet the objections of Aboriginal peoples who had not signed the agreement and whose rights Parliament was going to extinguish without their consent and without compensation. This was the situation of the Algonquins, the Atikamekw, the Montagnais and the Naskapis, among others. When the agreement was being negotiated, the Montagnais of Schefferville refused to take part in negotiations that excluded other Montagnais bands not living on the land in question.[114] Following discussions, the Northeastern Quebec Agreement was signed on 31 January 1978 between the parties to the JBNQA and the Naskapis of

Schefferville. Complementary Agreement No. 1, which amended the James Bay and Northern Quebec Agreement, was signed at the same time to allow the provisions of the agreement to apply to the Naskapis.[115] Like the JBNQA, the NQA included the surrender by the Naskapis of their rights to the lands covered by the JBNQA.

Paragraph 2.14 of the JBNQA provides that

> Quebec undertakes to negotiate with other Indians or Inuit who are not entitled to participate in the compensation and benefits of the present Agreement, in respect of any claims which such Indians or Inuit may have with respect to the Territory.
>
> Notwithstanding the undertakings of the preceding sub-paragraph, nothing in the present paragraph shall be deemed to constitute a recognition, by Canada, or Quebec, in any manner whatsoever, of any rights of such Indians or Inuit.
>
> Nothing in this paragraph shall affect the obligations, if any, that Canada may have with respect to the Territory. This paragraph shall not be enacted into law.[116]

Does the last sentence not confirm that Canada agreed not only to extinguish unilaterally the rights of Aboriginal peoples who had not signed the agreement (which raises the issue of its fiduciary obligations to them), but also to exclude the province's commitment to negotiate from its implementing legislation?

It must be remembered that the JBNQA and the implementing legislation preceded the *Constitution Act, 1982* and, in particular, the 1983 constitutional amendment to section 35, which represented a major change in the legal protection afforded such agreements. Before 1982, the JBNQA did not have constitutional protection. We will see later that section 35(3) was added in 1983 to provide constitutional protection to rights resulting from land claims agreement like the JBNQA. Whatever the intent of the parties in excluding paragraph 2.14 from the federal implementing legislation at the time the agreement was signed, the issue

must now be analyzed in light of the new constitutional status of the rights flowing from the agreement.

The federal implementing legislation repealed paragraphs 2(c), (d) and (e) of the 1912 federal boundaries act, which concerned Aboriginal peoples, as well as the part of the section referring to "the following terms and conditions and subject to the following provisions".[117]

In addition to enacting a general statute to give effect to the JBNQA,[118] the Quebec National Assembly passed more than 20 statutes entrenching the provisions of the agreement. The National Assembly proceeded by way of both specific legislation, such as the *Act respecting income security for Cree hunters and trappers who are beneficiaries under the agreement concerning James Bay and Northern Quebec*,[119] and amendments to existing general legislation such as the *Act to again amend the Environment Quality Act*.[120]

In the judgement rendered in *Cree Regional Authority* v. *Canada (Federal Administrator)*, Rouleau J. of the Federal Court, Trial Division, concluded that, as in *Guerin*, the federal government assumed fiduciary obligations when it extinguished the rights of Aboriginal peoples in section 3(3) of the JBNQA implementing legislation. Furthermore, he stated that "[i]n light of the fiduciary obligation imposed upon the federal government in its dealing with the native population...the Agreement mandates the protection of the aboriginal people who relinquished substantial rights in return for the protection of both levels of government".[121]

In other respects, the Federal Court of Appeal has held that even if the relationship between the Crown and Aboriginal peoples is recognized as fiduciary, this relationship "requires good faith and

reasonableness on both sides and presumes that each party respects the obligations that it assumed toward the other".[122] In this case, when the Aboriginal party argued that the principle of interpreting ambiguities in their favour results from the fiduciary relationship between them and the Crown, the Court replied that when the Crown negotiates land claims agreements with Aboriginal peoples today, it "need not and cannot have only these interests in mind. It must seek a compromise between that interest and the interests of the whole of society, which it also represents and of which aboriginals are part".[123]

In our opinion, the James Bay and Northern Quebec Agreement is one source of the federal Crown's fiduciary obligations to the Aboriginal peoples affected by the agreement.

To the extent that this land claims agreement is protected by section 35(3) of the *Constitution Act. 1982*, the rights it creates are protected on the same basis as treaty rights. Therefore, the Supreme Court's general guiding principle for interpreting section 35(1) also applies to rights created by the agreement. Given the constitutional protection extended to the rights flowing from the agreement, the JBNQA will necessarily have to be considered in any process involving the sovereignty of Quebec. As a signatory of the agreement, the federal government is bound by constitutional obligations that cannot be waived without the consent of the other parties to the agreement.

Moreover, the James Bay and Northern Quebec Agreement could be a source of fiduciary obligations for the Quebec Crown, which is also a signatory of the agreement, to the extent of the commitments the Quebec government made in the agreement. It is too soon to define the scope of these obligations precisely, but it is likely that the courts will extend the fiduciary obligations to the provincial Crown if it can be

established that the provincial Crown is, on the basis of the JBNQA, in a legal position equivalent to the one that gave rise to the federal Crown's fiduciary obligations. As the Supreme Court has stated, each treaty is unique and generates obligations, although all obligations created by treaty or agreement do not necessarily create fiduciary obligations.[124]

Thus, several legal situations can create fiduciary obligations on the part of the Crown to the Aboriginal peoples of Canada. As the existence of fiduciary relationships between these two parties does not automatically generate fiduciary obligations for the Crown, each source constitutes a special case. It is thus impossible to draw the conclusion that any one specific source necessarily results in a particular obligation.

The Constitution Act, 1982 (McNeil)

The *Constitution Act, 1982*, as amended,[125] contains three provisions relating expressly to the Aboriginal peoples of Canada. Section 25 of the *Canadian Charter of Rights and Freedoms* protects Aboriginal, treaty and other rights and freedoms of Aboriginal peoples from abrogation or derogation by the Charter.[126] This section acknowledges the special constitutional status of Aboriginal peoples and places their rights outside the scope of the fundamental principles of the Charter governing the relationship between Canadians and the federal and provincial governments.[127] In the context of Canada's fiduciary obligations to Aboriginal peoples, section 25 should probably be viewed more as an acknowledgement of the existence of those obligations than as an affirmation of them. The legislators responsible for section 25 recognized and acted upon an obligation to make special provision to protect the rights of Aboriginal peoples and ensured that these peoples

would have the legal means to defend their rights against Charter challenges.[128]

Another provision, section 35.1, states that

> 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,
> (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
> (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

This section requires consultation with Aboriginal peoples before amendments are made to the principal constitutional provisions respecting their rights. Although it falls short of a requirement for Aboriginal consent to any such amendments, it nonetheless provides a basis for fiduciary principles to be applied at the level of the constitutional amendment process.

For Aboriginal participation in section 35.1 talks to be meaningful, first ministers would have to consider seriously the views of Aboriginal representatives and take those views into account before proceeding with any amendments to the specified provisions. In other words, it would not be sufficient for first ministers simply to go through the motions of consultation. As the requirement for consultation is constitutional, it would ultimately be up to the courts to decide whether it had been met adequately. In doing so, it is suggested that the courts would use the fiduciary obligations owed to Aboriginal peoples as a means of deciding the issue. This approach would be consistent with the Supreme Court's decision in *Sparrow*, where it said that the presence or

absence of consultation with Aboriginal peoples would be a factor to be considered in deciding whether a federal law infringing Aboriginal rights could be justified.[129] Consultation is thus an aspect of the fiduciary relationship that the Court identified as the guiding principle against which the actions of government with respect to Aboriginal peoples must be assessed.[130] Where section 35.1 is concerned, the requirement for consultation is constitutionally explicit. Fiduciary principles therefore should apply in deciding whether the requirement has been met adequately.[131]

The most important provision relating to Aboriginal peoples in the 1982 act is section 35, which provides that

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35(1) was interpreted and applied by the Supreme Court of Canada in the *Sparrow* decision. The Court said that it had found in *Guerin*[132] that

> ...the Crown owed a fiduciary obligation to the Indians with respect to the lands [reserve lands surrendered to the Crown for lease to a golf club]. The *sui generis* nature of Indian title, and the historic powers and responsibilities assumed by the Crown constituted the source of such a fiduciary obligation.[133]

The Court went on to combine the *Guerin* approach with a principle laid down by the Ontario Court of Appeal in *R.* v. *Taylor and*

Williams that, in approaching Indian treaties, "[t]he honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."[134] Those two cases, the Supreme Court said,

> ...ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and the contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[135]

The Court then applied this guiding principle to oblige the federal government to justify any infringement of Aboriginal rights by meeting a stringent test.[136]

The *Sparrow* decision recognized that the fiduciary obligations owed to Aboriginal peoples are not limited to the context of land surrenders. The whole relationship between the federal government and Aboriginal peoples is trust-like, requiring the government to be sensitive to and respectful of the rights of those peoples.[137] Moreover, section 35(1) has constitutionalized the obligations, so that they bind the legislative as well as the executive branch of government. In other words, Parliament has to meet the obligations in enacting legislation, just as the Crown must in exercising its prerogative and delegated authority. As the Supreme Court said, federal legislative powers, including the power under section 91(24) of the *Constitution Act, 1867* to enact legislation relating to Indians, must

> ...now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[138]

In this respect, our interpretation of the *Rupert's Land Order*, which also placed constitutional obligations of a fiduciary nature on the

Parliament of Canada,[139] is consistent with the Supreme Court's interpretation of section 35(1) in this case.

Although the Supreme Court did not deal directly with the application of section 35(1) to provincial governments in *Sparrow*, it did make the general statement that the section "also affords aboriginal peoples constitutional protection against provincial legislative power."[140] The Court did not specify, however, whether provincial governments can avail themselves of the test the Court applied to the justification of federal infringements of Aboriginal rights. Professors Brian Slattery and Peter Hogg, two influential commentators on the constitutional rights of Aboriginal peoples, have nonetheless concluded that provincial infringements of those rights cannot be justified by the *Sparrow* test.[141] According to Professor Slattery, federal power to infringe Aboriginal rights in justifiable circumstances comes from section 91(24) of the *Constitution Act, 1867*. As federal jurisdiction over Indians and their reserved lands is exclusive, there can be no equivalent power in the provincial legislatures.[142] Adopting this reasoning, we agree that provincial legislation, unless referentially incorporated into federal law, is ineffective and unjustifiable to the extent that it attempts to infringe Aboriginal rights.[143]

While the *Sparrow* decision was limited to the infringement of Aboriginal rights, equivalent reasoning has been applied by some courts to infringements of treaty rights.[144] It can be argued, however, that infringements of treaty rights cannot be justified by the *Sparrow* test because violation of those solemn agreements directly involves the honour of the Crown, which the Supreme Court in *Sparrow* identified as a "guiding interpretive principle" where dealings with Aboriginal peoples are concerned.[145] In any case, we have seen that section 35(3)

provides that the words "treaty rights" in subsection (1) include "rights that now exist by way of land claims agreements or may be so acquired." So any treaty rights of the Aboriginal peoples of Quebec, including rights under the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement, are constitutionally protected and arguably cannot be infringed legislatively, even by federal legislation that meets the justificatory test set out in *Sparrow*. Quebec does not have the constitutional authority to infringe those rights. Moreover, the fiduciary obligations that Canada owes to the Aboriginal peoples of Quebec may impose an active duty on Canada to protect them against infringements of their Aboriginal and treaty rights by Quebec. In practical terms, this could mean that the government of Canada has an obligation to put political pressure on the Quebec government, and other provincial governments as well, to prevent any such infringements. In the event that political pressure failed, the government of Canada might be obliged to undertake or finance legal action challenging the constitutional validity of any attempted infringements.

The general fiduciary obligations of the federal government under section 35(1) are owed to the "Aboriginal peoples of Canada", defined in subsection (2) as including the "Indian, Inuit and Métis peoples of Canada." So whether the term "Indians" in section 91(24) of the *Constitution Act, 1867* includes the Métis as well as the Indians and Inuit is not relevant to section 35(1).[146] In *Sparrow*, the Supreme Court did not limit the application of fiduciary obligations to the Indians. On the contrary, it said that "the government has the responsibility to act in a fiduciary capacity with respect to *aboriginal peoples*."[147] As the Court was discussing the rights of those peoples in

the context of section 35, it must have been referring to Aboriginal peoples as defined there. The fiduciary obligations are therefore owed to the Métis as well as to the Indians and Inuit.

To sum up, the provisions of the *Constitution Act, 1982* that are most relevant to the fiduciary obligations owed to Aboriginal peoples are sections 35 and 35.1. Section 35(1) constitutionalizes the Crown's fiduciary obligations and makes them enforceable against Parliament as well as against the executive branch of the federal government. Absent referential incorporation into federal law, the section also prevents any infringement of Aboriginal and treaty rights by the provinces, including Quebec. As part of its fiduciary obligations, the government of Canada may have a positive duty to prevent provincial infringements of those rights. The federal and provincial governments are also required by section 35.1 to hold meaningful consultations with representatives of Aboriginal peoples before making constitutional amendments to the principal constitutional provisions respecting their rights. In the event of litigation over this provision, the courts would probably apply fiduciary principles in deciding whether the requirement had been met.

PART II
The Nature of the Obligations (Dupuis/McNeil)

Generally

In our discussion of their sources, we saw that fiduciary obligations flow from the historical relationship between the Crown and Aboriginal peoples, as revealed in the documentary record we examined. These obligations act as a check on any power the Crown (the executive branch of government) has over Aboriginal peoples. To the extent that

the Crown has discretionary power to make decisions affecting Aboriginal peoples, it is bound by those obligations to act for their benefit.[148] But as we have seen, parliamentary power over Aboriginal peoples was generally not subject to enforceable fiduciary obligations.[149] That changed with the enactment of section 35(1) of the *Constitution Act, 1982*, which imposed enforceable fiduciary obligations on Parliament by recognizing and affirming Aboriginal and treaty rights in the constitution.[150]

To the extent that fiduciary obligations arise in the context of governmental power over Aboriginal peoples,[151] the obligations of the Crown and the obligations of Parliament are probably not identical. The authority of the Crown is limited to prerogative and statutory powers,[152] whereas Parliament has broad legislative power under section 91(24) to enact laws in relation to Aboriginal peoples.[153] In either case, the fiduciary obligations would attach to the exercise of the powers and would therefore be co-extensive with the extent of the powers.

We also saw earlier that section 35(1) of the *Constitution Act, 1982* provides a shield against infringement of Aboriginal and treaty rights by the provinces.[154] It may be that neither the Crown in right of any of the provinces nor the provincial legislatures have any powers over those rights. If so, it would seem to follow that, to the extent that fiduciary obligations arise from discretionary powers over Aboriginal peoples, the absence of powers would result in an absence of obligations. However, by the enactment of section 88 of the *Indian Act*,[155] Parliament has made some provincial laws of general application apply to Indians, thereby giving the provincial legislatures limited powers to infringe Aboriginal rights.[156] To the extent that the

provincial legislatures have this power, they should be subject to the same fiduciary obligations and the same test for justification as Parliament.[157]

Although the discretionary power of the Crown and Parliament and, to a lesser extent, the provincial legislatures over the Aboriginal peoples is a major reason for the existence of fiduciary obligations, it is not the only reason. As we have seen, the obligations also arise from undertakings by the Crown and Parliament, in such documents as the *Royal Proclamation of 1763* and the joint address approved by the *Rupert's Land Order*, to fulfil a protective role where the interests of Aboriginal peoples are concerned. In the Royal Proclamation, the Crown acted to protect Aboriginal peoples from interference with their land rights and exploitation by European settlers.[158] In the joint address, Parliament undertook "to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer" of Rupert's Land.[159] These documents created positive obligations that go beyond a mere duty not to exercise discretionary powers to the detriment of Aboriginal peoples. The Crown and Parliament undertook to protect the interests of those peoples against third parties, including provincial governments. Moreover, in many of the treaties, and in modern land claims agreements like the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement, discussed earlier, the Crown undertook to set aside lands for the Aboriginal signatories and to provide other benefits. These treaties and agreements created obligations that are binding on the Crown in all its capacities[160] and that now impose fiduciary obligations on Parliament as well, because of section 35(1) of the *Constitution Act, 1982*.[161]

For purposes of this paper, it is not necessary to attempt to define the full scope of the fiduciary obligations of the Crown and Parliament to Aboriginal peoples. Instead, we will focus on matters that relate most directly to federal responsibilities in the context of accession to sovereignty by Quebec, namely, fiduciary obligations with respect to Aboriginal self-determination and land and resource rights. We examine these matters first in a general way and then with direct reference to Quebec.

Self-determination, including self-government

If the Aboriginal peoples of Canada have a broad right of external self-determination, permitting them to secede from Canada if they so wish and set up independent states, the source of this right must lie outside domestic law. Canadian constitutional law does not contain a right of secession.[162] Aboriginal peoples may nonetheless have a more limited constitutional right of internal self-determination in Canadian law that would allow them to exercise some degree of sovereignty or jurisdiction over their own citizens (personal jurisdiction) and territories (territorial jurisdiction). This right of internal self-determination would stem from the fact that the Aboriginal peoples were independent, sovereign nations before European colonization of North America. Successful assertions of sovereignty by European nations diminished but did not abrogate the inherent sovereignty of Aboriginal nations.[163] Moreover, it can be argued that extensions of Canadian jurisdiction over Aboriginal nations by section 91(24) of the *Constitution Act, 1867* and the enactment of the *Indian Act* did not eliminate Aboriginal sovereignty.[164] If so, Aboriginal peoples retained the inherent right to govern themselves and

their territories, subject to any valid Canadian legislation limiting or regulating that right of self-government.[165]

If this inherent right of self-government was not extinguished before 17 April 1982,[166] it would have been in existence when the *Constitution Act, 1982* came into force. Assuming it is an Aboriginal right or a treaty right, it would have been recognized and affirmed by section 35(1) of that act.[167] Within the constitutional space provided by that section, Aboriginal peoples would be self-determining in the sense that they could decide for themselves to a certain extent how they wanted to exercise their right of self-government within Canada.[168]

If the right of self-government has constitutional status, it can be extinguished only by constitutional amendment.[169] However, according to the *Sparrow* decision it could nonetheless be regulated by federal legislation that meets a strict test of justification.[170] It is in this context that the fiduciary obligations begin to come into play. As we have seen, the *Sparrow* decision broadened those obligations to cover the whole relationship between Canada and Aboriginal peoples, binding both the executive and the legislative branch of the federal government.[171] So any regulation of the right of self-government by federal legislation would have to be consistent with Canada's fiduciary obligations. As the Supreme Court said in *Sparrow*, "[t]he special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."[172] To give one example, to the extent that the *Indian Act* purports to regulate Aboriginal self-government by dictating the form and powers of Indian governments on reserves,[173] it would be subject to scrutiny and

possible invalidation as an unjustifiable infringement of the right of self-government.[174]

The fiduciary obligations are owed to Aboriginal nations as political entities with collective rights.[175] The federal government, as a consequence of its constitutional jurisdiction over "Indians, and Lands reserved for the Indians", has primary responsibility for fulfilling those obligations.[176] As the Supreme Court said in *Sparrow*, "federal power must be reconciled with federal duty."[177] In the context of the Aboriginal right to fish, this duty required the federal government to justify any federal infringements of that right. However, in the context of an attempted infringement of an Aboriginal right by a province, we have seen that the federal duty may require active intervention by the federal government to protect the right.[178] This is in keeping with the undertaking of Parliament, when Rupert's Land and the North-Western Territory were transferred to Canada in 1870, "to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer".[179]

Land and resource rights

In *Guerin*,[180] the Supreme Court decided that the Crown has a fiduciary obligation to Aboriginal nations with respect to their surrendered lands. Although the case involved reserve lands, the principles that guided the Court are clearly applicable to lands held by Aboriginal title as well. According to Dickson J., who delivered the judgement of four of the eight-member bench,

> [t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in land does not, however, in itself give rise to a fiduciary relationship

between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown....

The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[181]

Wilson J., speaking for herself and two other justices, also found that "[t]he [fiduciary] obligation has its roots in the aboriginal title of Canada's Indians". She decided that section 18 of the *Indian Act* – which provides that reserves are held by the Crown for the use and benefit of the bands for which they are set apart – "is the acknowledgement of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it." Justice Wilson clearly regarded this responsibility as involving a positive duty to safeguard Indian interests. Referring to the Crown, she wrote that "it does hold the [reserve] lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction."[182]

Given that the fiduciary obligations of the federal government extend to lands held by Aboriginal title as well as reserve lands, the government has a duty to ensure that the interests of Aboriginal peoples are protected in any surrender of their title to the Crown. Compliance with the *Royal Proclamation of 1763* and the *Rupert's Land Order* would be required as well, of course, in parts of Canada where those constitutional instruments apply.[183] Although *Guerin* did not determine the existence or the nature of the fiduciary obligations before a

surrender, it is clear from the decision that a surrender of Aboriginal lands does give rise to fiduciary obligations.[184] Moreover, the federal government has a continuing obligation to ensure that the terms of the surrender are carried out, both by living up to its own commitments and by ensuring that other parties to or beneficiaries of the surrender comply with the terms of the surrender. This is a broad duty that includes, but is not limited to, any obligations set out specifically in the surrender document.[185]

In *Guerin*, the Supreme Court held that the Crown in right of Canada breached its fiduciary obligation to the Musqueam Indians by entering into a lease for some of their reserve lands on terms less favourable than those discussed earlier with the Musqueams. That is just one context for the application of the federal government's fiduciary obligations regarding Aboriginal land and resource rights. In the *Sparrow* decision, the Supreme Court regarded those obligations as extending to government action generally. As we have seen, the Court said that

> ...the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[186]

The Court required the federal government to meet a stringent test to justify any infringement of the Musqueams' Aboriginal right to fish. If the government could not do so, it was acting in breach of its fiduciary obligations to them and in violation of their constitutional rights. The fiduciary obligations therefore include the safeguarding of Aboriginal resource use pursuant to Aboriginal or treaty rights.[187]

In Quebec

Case law has not indicated that the fiduciary obligations to Aboriginal peoples in Quebec are generally any different from those in the rest of Canada. Although the two leading cases on fiduciary obligations, *Guerin* and *Sparrow*, both involved the Musqueam Nation in British Columbia, the Supreme Court spoke as though the obligations are owed equally to Aboriginal peoples throughout Canada.[188] Moreover, *Quebec (A.G.)* v. *Canada (N.E.B.)* involved a claim by the Grand Council of the Crees (of Quebec) that the National Energy Board (NEB) owed them a fiduciary duty when making a decision on whether to grant a licence to export electricity from a hydroelectric project. The Supreme Court acknowledged the existence of a fiduciary relationship between the federal government and the Aboriginal peoples of Quebec. However, it decided that the NEB did not have a fiduciary duty when acting in its quasi-judicial capacity to decide whether to grant an export licence. Iacobucci J., who delivered the unanimous judgement, said:

> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin* v. *The Queen* [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd.* v. *International Corona Resources Ltd.* [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.[189]

Given that the nature of the relationship between Aboriginal peoples and the federal government defines the scope of the fiduciary obligations, the obligations can vary as the relationship varies. Thus,

while the federal government owes fiduciary obligations to the Indian, Inuit and Métis peoples of Canada as a consequence of, for example, the recognition and affirmation of their Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*, the government's relationship with each those peoples is not same. Although section 91(24) of the *Constitution Act, 1867* includes Indians, Inuit and, probably, Métis people,[190] the *Indian Act* applies only to Indians who are registered or entitled to be registered under that statute. The *Indian Act* creates a special statutory relationship, entailing fiduciary obligations, between the federal government and the Indians to whom it applies. Those obligations are not necessarily the same as those owed to Aboriginal peoples who are outside the scope of the Act. To give another example, some Aboriginal peoples have signed treaties or land claims agreements with the Crown, while others have not. These treaties and agreements altered the relationships that existed between the Aboriginal parties and the Crown before they were signed. The Crown therefore owes obligations to the Aboriginal signatories that are no doubt different from the obligations it owes Aboriginal peoples who have never signed treaties or agreements. Moreover, the Crown's obligations under treaties and agreements vary.

To determine the nature and extent of the federal government's fiduciary obligations to Aboriginal peoples in Quebec, one therefore must make a distinction between obligations that apply to all Aboriginal peoples throughout Canada and those that are either regional or distinct to certain Aboriginal peoples. As discussed earlier, the federal government has constitutional responsibility for the Aboriginal peoples of Canada (or at least Indian peoples and Inuit) under section 91(24) of the *Constitution Act, 1867*.[191] It also has a general obligation under

section 35(1) of the *Constitution Act, 1982* to respect and protect Aboriginal and treaty rights.[192] The nature of those rights may vary from one Aboriginal people to another, but the general obligation applies to all. The federal government therefore has constitutional obligations to respect and protect any Aboriginal and treaty rights, including rights under land claims agreements,[193] that Aboriginal peoples in Quebec have.

Earlier we discussed the fiduciary obligations arising under selected treaties with the Aboriginal peoples of Quebec and under the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement. We also discussed several documents that apply regionally, including the Capitulation of Montreal, the *Royal Proclamation of 1763*,[194] the *Rupert's Land Order*, and the Quebec boundaries acts of 1898 and 1912. The scope and nature of the fiduciary obligations under those documents need not be reiterated here. Nor is it necessary for purposes of this paper to describe in detail all the possible fiduciary obligations owed to the various Aboriginal peoples in Quebec. Our task instead is to determine the nature of the federal government's fiduciary obligations in the context of accession to sovereignty by Quebec. We address that issue in the next part.

PART III
Fiduciary Obligations in the Context of Accession to Sovereignty by Quebec

Implications for Domestic Law (Dupuis)

In this section, we examine the rules of Canadian law that govern the concept of fiduciary obligations in the context of accession to sovereignty by Quebec. Quebec is the only Canadian province whose

government advocates a form of sovereignty for the province. This was one of the key planks in the platform of the Parti québécois when it was first elected in 1973 for two successive terms. It came to power again in the autumn of 1994.

If the occasion arose, our analysis could apply to any other Canadian province, albeit adjusted to take into account, for example, the historical sources unique to each province. The concept of the federal Crown's fiduciary obligations is recognized in Canadian law as applying in all of Canada.

Referendum on Quebec sovereignty (Dupuis)

We turn first to the issue of the Crown's fiduciary obligations in the context of a provincial referendum on sovereignty in Quebec. Such a referendum would be held within the existing Canadian constitutional framework, that is, with the current constitutional division of powers between the provinces and the federal government. In this context, the referendum would occur in Quebec under its current status as a Canadian province. The purpose of the referendum would be to determine whether the people of Quebec wanted Quebec to remain a Canadian province or to become sovereign, outside the Canadian legal framework.

We will not consider here whether the existing Canadian constitution recognizes Aboriginal government as a third order of government in addition to federal and provincial governments, an issue that is beyond the scope of this study.

The present government of Quebec has decided to hold a referendum on the question of sovereignty. One referendum on sovereignty-association was already held by the Parti Québécois

government in 1980. When re-elected in the fall of 1994, the PQ decided to consult the people of Quebec again and, in December 1994, tabled draft legislation on sovereignty on which it intends to ask them to vote in a referendum. The exact timing of the referendum has not yet been determined but the premier of Quebec, Jacques Parizeau, has indicated that he intends to consult the people in 1995.

Section 1 of the draft bill on Quebec sovereignty states that Quebec is a sovereign country. Section 2 provides for the possibility of maintaining an economic association between Quebec and Canada.

Section 3 refers explicitly to Aboriginal peoples. It focuses on the future Quebec constitution and contains a number of provisions, including constitutional recognition of the right of self-government of Aboriginal nations on lands to which they have full ownership. The bill states that such recognition will be exercised in a manner consistent with the territorial integrity of Quebec.

Section 7 states that Quebec will assume the obligations and enjoy the rights arising out of the treaties to which Canada is a party and the international conventions to which Canada is a signatory, in accordance with the rules of international law.

Section 10 provides for the continuity of federal laws and regulations that apply in Quebec until amended or repealed by a Quebec statute.

The government also set up provincial and regional consultative commissions to inform and consult the people on all aspects of this issue. These commissions held public hearings in February and March 1995 and reported to the government. Indian peoples and Inuit in Quebec made public their opposition to the draft legislation and to the government's approach and received considerable media coverage as a

result. Some First Nations, including the Crees and the Montagnais, have held public hearings and are considering holding a parallel referendum.

In connection with the process to consult the people, does the federal government have a special role to play with respect to the Aboriginal peoples with whom it has a fiduciary relationship? If so, would a specific fiduciary obligation result?

Quebec has chosen to hold the referendum under the general referendum legislation already in place.[195] Under this law, a consultative referendum is instigated by the government, which must submit the referendum question to a vote in the National Assembly. The 1980 referendum on sovereignty-association, held by the government of Quebec under the leadership of Premier René Lévesque, was conducted under this law.

For referendum purposes, the electoral constituencies include reserves and other Indian settlements and Inuit villages. Aboriginal communities do not constitute distinct constituencies; they are included in larger constituencies. In the territory covered by the James Bay and Northern Quebec Agreement, the Aboriginal peoples (Crees and Inuit) account for a large number of voters, but this is the only part of Quebec where this is the case. The referendum legislation also provides for the use of Aboriginal languages on ballot papers.

In this way, the Quebec law ensures that the members of the various Aboriginal peoples of the province can participate as individuals in a referendum process; this is in keeping with the spirit of the *Canadian Charter of Rights and Freedoms*.

As individuals, Aboriginal people can thus rely on the provisions of this law – to the extent that they wish to take part in any or all

stages of a provincial referendum on the possible sovereignty of Quebec — which ensures that they have the right to information, the right to join committees, freedom of speech and the right to vote. As a result, Aboriginal people have, as individuals, the right to express their opinion in a possible referendum. Indeed some of them did so in 1980.[196] However, the individual rights of Aboriginal people do not necessarily coincide with their collective rights as peoples. The distinction between these individual rights and the collective rights of Aboriginal peoples is particularly important in relation to fiduciary obligations.

What becomes of their collective rights during such a process? Do they have collective rights that bring into play the federal government's obligations to them? Does the federal government have a particular role to play in such a process in this respect?

We saw earlier that there is a fiduciary relationship between the federal Crown and Aboriginal peoples, as collectivities, and that in certain situations this relationship results in fiduciary obligations for the federal Crown. It can be said that the federal government has no specific responsibility to individual Aboriginal people with respect to the exercise of their rights in a referendum. However, we believe that the federal government's responsibility to Aboriginal peoples collectively means that it must ensure that the views and concerns of Aboriginal peoples with respect to the effects of such a referendum are made known to the population. Of course the federal government cannot compel Aboriginal people to participate in the province's consultative process. That is their decision. The federal government must, however, assure the protection of constitutional Aboriginal and treaty rights. While it might be said that the process in itself does not infringe on

those rights, the process nonetheless represents a step toward a major legal and political change in Canada – the sovereignty of Quebec.

The government of Canada could take various steps to comply with its fiduciary obligations to Aboriginal peoples. It could provide resources for Aboriginal people to argue their point of view during this process. The government of Canada could take steps to raise public awareness of the possible effects of Quebec sovereignty on the rights of Aboriginal peoples. It could inform the people of Canada of the federal government's duty to protect the rights of Aboriginal peoples as a result of its fiduciary obligations, that it intends to honour this duty, and that this duty will remain, whatever the result of the referendum.

Negotiations concerning Quebec sovereignty (Dupuis)

In this section, we examine what would occur if the governments of Canada and Quebec agreed to negotiate sovereignty for Quebec. The negotiations would take place in the current Canadian constitutional framework and would take the form of bilateral negotiations between the federal government and the government of Quebec. This would not be a constitutional process, which requires the participation and support of the provinces under the constitutional amendment formula and the participation of Aboriginal people under section 35.1 of the *Constitution Act, 1982*. These negotiations would be a separate and preliminary process to any constitutional process on this subject. Any agreement on the sovereignty of Quebec flowing from this preliminary bilateral process would have to be formalized as a constitutional amendment at a later date.

We assume that both governments would have agreed that the negotiations would be designed to change the Canadian constitutional

framework. In this situation, the two governments might or might not have reached consensus on the ultimate establishment of two separate states. Issues concerning Aboriginal peoples would be only one of the many items on the agenda for these negotiations.

Would such a negotiating process between the government of Canada and the government of Quebec give rise in itself to a fiduciary obligation? It is necessary to distinguish between the process itself and the fundamental issues considered during the negotiating process.

In the existing constitutional framework, the federal government is primarily responsible for acting in a fiduciary capacity with respect to Aboriginal peoples. It would retain this responsibility in any negotiations with Quebec concerning its possible attainment of sovereignty. Federal constitutional jurisdiction (under section 91(24) of the *Constitution Act, 1867*) over Indian peoples (and Inuit and perhaps Métis people) and the lands reserved for them would, for example, require the federal government to defend the interests of Aboriginal peoples with respect to lands reserved for them.

Furthermore, the federal government would be responsible for ensuring respect for the Aboriginal and treaty rights of the Aboriginal peoples (Indian, Inuit and Métis peoples) protected by section 35(1) of the *Constitution Act, 1982*. Recall that rights created by land claims agreements such as the James Bay and Northern Quebec Agreement are considered treaty rights under section 35(3) and accordingly are protected by that section.

The federal government would therefore have to assume this obligation in its negotiations with Quebec. In this regard, it would first have to consult Aboriginal peoples in Quebec. Even if the *Sparrow* test developed by the Supreme Court of Canada (concerning the factors to

consider when analyzing the rationale for a statute that infringes a protected constitutional right) does not apply in this instance, it can be argued by analogy that the federal government would have an obligation to consult Aboriginal peoples in Quebec on the arrangements being negotiated between Canada and Quebec.

In other respects, Canada's current legal system does not give Aboriginal peoples the right to participate directly in such negotiations, whether as parties to the proceedings, observers of the negotiations or signatories of any agreement that might result. The governments of Canada and Quebec do not have a legal obligation to ensure that Aboriginal peoples play a direct part in such preliminary negotiations preceding the constitutional process that would eventually follow an agreement between Canada and Quebec.

Although the law does not impose an obligation on governments to ensure that Aboriginal peoples participate directly in negotiations, the legitimacy of such an approach could be called into question. The constitution provides specifically for the participation of Aboriginal peoples in constitutional discussions on issues affecting them directly. In addition, Aboriginal peoples were invited to participate in the comprehensive constitutional negotiations that followed the rejection of the Meech Lake Accord and that led to adoption of the Charlottetown Accord in 1992. Although the Charlottetown Accord was not ultimately approved, the negotiations dealt with numerous aspects of Canadian federalism that went far beyond Aboriginal issues. Aboriginal peoples were not allowed to participate, however, in constitutional negotiations leading to the Meech Lake Accord; it is therefore too early to say whether their participation in the Charlottetown process established a precedent that will lead at some point to a constitutional convention

assuring the participation of Aboriginal peoples in any constitutional process – or whether their participation was merely a reaction to the problems generated by the Meech Lake process.

However, as any agreement resulting from such negotiations, to have legal effect, would require constitutional amendments that would have an impact on section 91(24) of the *Constitution Act, 1867* and sections 25, 35 and 35.1 of the *Constitution Act, 1982*, the federal and provincial governments would probably be bound, under section 35.1, by the commitment in principle to convene a constitutional conference in which Aboriginal representatives were invited to participate. This requirement results not from fiduciary obligations but from the constitutional guarantee of participation in section 35.1 of the *Constitution Act, 1982*. In addition to this constitutional requirement, the federal government probably has a fiduciary obligation to ensure that Aboriginal peoples participate in any constitutional discussions held following an agreement between the governments of Canada and Quebec on the sovereignty of Quebec, bearing in mind the effects of such an agreement on their Aboriginal and treaty rights.[197]

Thus, governments have no legal obligation to ensure that Aboriginal peoples participate directly in bilateral negotiations between the governments of Canada and Quebec preceding any constitutional process leading eventually to sovereignty. Instead, considerations of legitimacy or political advisability would come into play.

If Aboriginal peoples do not participate directly in the negotiations, they could attempt to have the courts set aside an agreement that they thought was contrary to the federal government's fiduciary obligations. They would then have to establish that such an agreement concerned a situation involving a fiduciary obligation on the

part of the federal government and that the federal government had contravened this obligation by signing the agreement in question. The courts would then have to render a decision on whether the federal government had fulfilled its fiduciary obligations in the negotiations.

One can imagine numerous scenarios for the contents of such an agreement. The agreement might or might not include a section on the Crown's fiduciary obligations. If there were such a section, it could, for example, provide for fiduciary obligations to be transferred to Quebec in the form they had at the time of the transfer. Or, the agreement might require the parties to agree that Quebec would amend its legal system to include fiduciary obligations with respect to Aboriginal peoples equivalent to the present fiduciary obligations of the federal Crown. The agreement could also make provision for the courts to rule on the transition or transfer of the federal Crown's fiduciary obligations to Quebec.

Like all subjects under negotiation, this issue can give rise to all kinds of speculation. Nor should it be forgotten that Aboriginal issues would be only one component among many being negotiated. It is thus difficult to assess in the abstract the relative weight, in the specific circumstances of such negotiations, of Aboriginal issues compared with issues like defence or currency.

Unilateral declaration of independence by Quebec (McNeil)

If a negotiated agreement could not be reached between Quebec and Canada, Quebec might choose to act on its own and issue a unilateral declaration of independence (UDI). As the Canadian constitution does not allow for secession by a province, a UDI would have no force or effect in Canadian law.[198] In the absence of recognition by Canada of

Quebec's independence, from the perspective of Canadian constitutional law (though not necessarily from the perspective of Quebec law[199]) Quebec would still be part of Canada. As a result, in Canadian law the federal government's responsibilities and authority in Quebec would continue.[200]

As long as Canada did not recognize Quebec as independent and continued to assert its legitimate authority,[201] that state of affairs would persist. Canadian courts would probably be bound to accept the federal government's position that Quebec was still part of Canada[202] and would have to declare unlawful any acts of the Quebec government that were inconsistent with that position. Although the Quebec government might eventually gain legitimacy through international recognition, in the face of Canadian opposition and opposition from Aboriginal peoples in Quebec and elsewhere in Canada, that recognition would not necessarily be forthcoming. But in any case, Canadian courts would probably be bound to continue to apply Canadian constitutional law to Quebec as long as Canada refused to recognize Quebec's independence.[203]

In our discussion of the sources and nature of the fiduciary obligations, we concluded that the government of Canada has constitutionally-enforceable fiduciary obligations to Aboriginal peoples in Quebec. Those obligations will remain as long as the federal government continues to assert jurisdiction over Quebec and will be enforceable in Canadian courts. But even more important in the context of a UDI by Quebec, the fiduciary obligations require Canada to maintain its relationship with Aboriginal peoples in Quebec for as long as necessary to protect their interests. The government of Canada has constitutional responsibility for Aboriginal peoples and cannot renounce

that responsibility unilaterally.[204] If Aboriginal peoples do not accept Quebec independence, the government of Canada has a constitutional obligation to ensure that their interests are protected in face of a UDI.[205]

Canada's obligations to Aboriginal peoples in Quebec in the event of a UDI would include a duty to consult with Aboriginal peoples both inside and outside Quebec[206] to ascertain their views in that context.[207] The Canadian government would be obliged to take their views into account and to give top priority to the protection of their Aboriginal and treaty rights.[208] As we have seen, at present those rights are constitutionally protected by section 35(1) of the *Constitution Act, 1982*.[209] That protection can be removed only by a constitutional amendment requiring the authorization of Parliament and the legislatures of at least two-thirds of the provinces with at least 50 per cent of the population of all the provinces – made after a constitutional conference to which representatives of the Aboriginal peoples would have to be invited.[210] After Quebec independence, that protection would disappear. Even if Quebec included protections of Aboriginal and treaty rights in its new constitution, those protections could be removed by Quebec at any time in accordance with that constitution's amending formula.

Canada would therefore be constitutionally obliged to take appropriate action to protect Aboriginal and treaty rights in the event of a UDI. Canada could do this in several ways: (1) by issuing a declaration that Quebec is still part of Canada, thereby denying recognition of Quebec as an independent state; (2) by lobbying the international community to deny recognition to Quebec; (3) by instructing federal employees, both inside and outside Quebec, to

disregard a UDI; (4) by applying to the Supreme Court of Canada by way of reference for an opinion that a UDI is unconstitutional and in violation of the Aboriginal and treaty rights of Aboriginal peoples, in Quebec and elsewhere; (5) by resorting to whatever other measures the federal government deemed necessary in the circumstances. While the federal government would have discretion to choose actions it regarded as appropriate, those actions would have to be adequate to protect the rights of Aboriginal peoples. In the event that the federal government neglected or refused to take adequate actions, Aboriginal peoples could go to Canadian courts to seek legal sanctions against the government for breach of its constitutional obligations.

CONCLUSIONS (Dupuis/McNeil)

Our study has led us to identify a number of conclusions regarding the fiduciary obligations of the Canadian Crown in the context of accession to sovereignty by Quebec:

1. Recognition in Canadian law of fiduciary relationships between the federal government and the Aboriginal peoples of Canada based on their historical relationships is a recently recognized but now established fact.
2. These fiduciary relationships can, under certain circumstances, give rise to fiduciary obligations *sui generis* on the part of the federal Crown to Aboriginal peoples.
3. The recent recognition of the existence of fiduciary relationships and resulting fiduciary obligations is a major departure from the courts' previous interpretation of the responsibilities of the Crown to Aboriginal peoples.

4. This major departure involves a thorough reconsideration of the historical facts and their legal consequences in terms of this new legal reality.
5. Although this has not been established so far, the fiduciary obligations probably also apply, in certain circumstances, to provincial Crowns.
6. The fiduciary obligations impose limits on the exercise of legislative and executive powers.
7. The fiduciary obligations are enforceable in law. Aboriginal peoples can apply to the courts and obtain redress when they can prove that the Crown has not fulfilled its fiduciary obligations.
8. There are various sources of the fiduciary obligations, which may flow from unilateral actions such as legislation, or from bilateral actions such as treaties signed with Indian peoples.
9. The federal Crown's fiduciary obligations are by their nature uniform throughout Canada. However, the extent and scope of the obligations vary because of the diversity of their sources.
10. The fiduciary obligations exist under the present Canadian constitutional regime.
11. The federal government must assume its fiduciary responsibility in relation to Aboriginal peoples in the context of a referendum concerning the accession of Quebec to sovereignty.
12. The federal government should also assume its fiduciary responsibility in relation to Aboriginal peoples in the context of possible negotiations concerning the accession of Quebec to sovereignty.
13. Assuming that an agreement would result from such negotiations and that this agreement would have an impact on section 91(24)

of the *Constitution Act, 1867* or sections 25, 35 and 35.1 of the *Constitution Act, 1982*, the federal government should then hold a constitutional conference in which the Aboriginal peoples of Canada should be invited to participate. A failure to comply with this obligation would probably violate section 35.1 and call into question the fiduciary obligations of the federal Crown to Aboriginal peoples. In addition, the agreement itself might call those obligations into question.

14. In the event of a unilateral declaration of independence by Quebec, irrespective of the position in Quebec law, in Canadian law the federal government's fiduciary obligations to Aboriginal peoples in Quebec would continue for as long as Canada did not recognize Quebec's independence and continued to assert its legitimate authority. These obligations would require Canada to take appropriate action to ensure that the rights of Aboriginal peoples in Quebec, in particular their Aboriginal and treaty rights, were protected.

Notes

1. *Quebec (A.G.)* v. *Canada (N.E.B.)*, [1994] 1 S.C.R. 159 (cited hereafter as *N.E.B.*).

2. *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1108 (cited hereafter as *Sparrow*).

3. *N.E.B.*, cited in note 1, p. 24.

4. *Guerin* v. *R.*, [1984] 2 S.C.R. 335 at 348 (cited hereafter as *Guerin*).

5. *R.* v. *Agawa* (1988), 28 O.A.C. 201 at 215-216.

6. *Guerin*, cited in note 4, p. 385; *Sparrow*, cited in note 2, p. 1109; *N.E.B.*, cited in note 1, p. 26.

7. E. Weinrib, "The Fiduciary Obligation", *University of Toronto Law Journal* 25 (1975), p. 7, quoted by Dickson C.J. in *Guerin*, cited in note 4, p. 384, and by La Forest J. in *Lac Minerals* v. *International Corona Resources*, [1989] 2 S.C.R. 574 at 645 (cited hereafter as *Lac Minerals*); *Frame* v. *Smith*, [1987] 2 S.C.R. 99, quoted by Wilson J. in *Lac Minerals* at 646.

8. *Lac Minerals*, cited in note 7, p. 649.

9. *Guerin*, cited in note 4, p. 376.

10. *United States* v. *Mitchell*, 463 U.S. 206 (1983).

11. See, among others, *Guerin*, cited in note 4; *Sparrow*, cited in note 2; *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85; *A.G. Ontario* v. *Bear Island Foundation*, [1991] 2 S.C.R. 570; *N.E.B.*, cited in note 1.

12. "Treaty of Utrecht", in *British and Foreign State Papers, 1846-1847* (London: Harrison and Sons, 1860), pp. 843-844.

13. "Treaty of Utrecht", cited in note 12, p. 67.

14. A. Shortt and A.G. Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, second edition, Part I (Ottawa: King's Printer, 1918).

15. *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1063 (cited hereafter as *Sioui*).

16. C.W. Alvord, *Genesis of the Proclamation of 1763* (Lansing, Michigan: Michigan Pioneer and Historical Collections, 1908), p. 7.

17. Shortt and Doughty, cited in note 14, p. 115.

18. Shortt and Doughty, p. 163.

19. *Quebec Act* (1774), 14 Geo. III, chapter 83 (U.K.).

20. Section 25 of the *Canadian Charter of Rights and Freedoms* reads as follows:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

21. *St. Catharines Milling Co.* v. *The Queen*, [1887] 13 S.C.R. 577 at 652.

22. *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313 at 395 (cited hereafter as *Calder*).

23. *Adams* v. *R.*, [1993] R.J.Q. 1011 (C.A.) (cited hereafter as *Adams*); and *Côté* v. *R.*, [1993] R.J.Q. 1350 (C.A.) (cited hereafter as *Côté*).

24. Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979), p. 204.

25. Shortt and Doughty, cited in note 14, p. 139.

26. Commission d'étude sur l'intégrité du territoire du Québec, *Le domaine indien* [Indian lands], Commissioners' report, volume 4.1 (Quebec City: 1971), pp. 243-255.

27. *Calder*, cited in note 22.

28. *Calder*, p. 323.

29. *Calder*, p. 398.

30. *Sioui*, cited in note 15, p. 1052.

31. "Instructions to Governor Murray", in Shortt and Doughty, cited in note 14, p. 181.

32. "Instructions", cited in note 31, p. 199.

33. "Instructions", p. 199.

34. "Instructions to Governor Carleton, 1768", in Shortt and Doughty, cited in note 14, p. 301.

35. "Instructions to Governor Carleton, 1775", in Shortt and Doughty, cited in note 14, Part 2, p. 594.

36. "Instructions", cited in note 35, p. 594.

37. The Five Nations: the Agniers (Mohawks), the Onneiouts (Oneidas), the Onontagues (Onondagas), the Goyogouins (Cayugas) and the Tsonnontouans (Senecas).

38. G. Havard, *La Grande Paix de Montréal de 1701* (Montreal: Recherches Amérindiennes au Québec, 1992), p. 132.

39. *Adams*, cited in note 23. The Supreme Court of Canada has granted leave to appeal this judgement.

40. *Côté*, cited in note 23. The Supreme Court of Canada has granted leave to appeal this judgement.

41. *Côté*, p. 1370.

42. R.S.C. 1985, chapter I-5.

43. *Sioui*, p. 1056.

44. *Simon* v. *R.*, [1985] 2 S.C.R. 387.

45. *Sioui*, cited in note 15, p. 1072.

46. 30 & 31 Vict., chapter 3 (U.K.), section 3 (formerly the *British North America Act*).

47. The British Parliament, by virtue of colonial constitutional law and the *Colonial Laws Validity Act, 1865*, 28 & 29 Vict., chapter 63 (U.K.), retained legislative power over Canada until the

Statute of Westminster, 1931, 22 Geo. V, chapter 4 (U.K.), limited that power to the *British North America Acts* and other legislation requested by Canada. With patriation of the Canadian constitution by the *Canada Act 1982*, 1982, chapter 11 (U.K.), the power of the British Parliament over Canada ceased. See Brian Slattery, "The Independence of Canada", *Supreme Court Law Review* 5 (1983), p. 369; Peter W. Hogg, *Constitutional Law of Canada*, third edition (Toronto: Carswell, 1992), chapter 3.

48. See *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] A.C. 566 (P.C.) at 579-580.

49. This process culminated with the imperial conferences of 1926 and 1930 and the *Statute of Westminster*. See Arthur Berriedale Keith, *The Constitutional Law of the British Dominions* (London: Macmillan, 1933), pp. 7-13, 45-57, 67-78; Robert B. Stewart, *Treaty Relations of the British Commonwealth of Nations* (New York: Macmillan, 1939), pp. 133-135, 159-178, 367-368; Maurice Ollivier, ed., *The Colonial and Imperial Conferences from 1887 to 1937* (Ottawa: Queen's Printer, 1954), volume 3, especially pp. 150-157.

50. The term 'Indians' has been broadly defined by the Supreme Court of Canada to include Inuit. See *Reference re Term "Indians"*, [1939] S.C.R. 104. Although the courts have never determined authoritatively whether the term also includes Métis people, compelling arguments have been made that they are included. See Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867", *Saskatchewan Law Review* 43 (1978-79), p. 37.

51. These lands include not only formal reserves, as defined in the *Indian Act*, but all lands reserved for the Indians, including those reserved by the *Royal Proclamation of 1763*. See *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46 (P.C.); discussion in Robert D.J. Pugh, "Are Northern Lands Reserved for the Indians?", *Canadian Bar Review* 60 (1982), p. 36; Brian Slattery, "Understanding Aboriginal Rights", *Canadian Bar Review* 66 (1987), pp. 773-774.

52. See *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 (Engl. C.A.), especially per Kerr L.J. at 105-107; cf. per Denning M.R. at 92-99.

53. This conclusion accords with American jurisprudence regarding the status of the Indian tribes in the United States. In *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831), the United States Supreme Court decided that tribes within the boundaries of the United States are not foreign nations. However, because they have attributes of nation-states, Chief Justice Marshall described them as "domestic dependent nations" (p. 17).

54. See Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations", *McGill Law Journal* 36 (1991), pp. 314-317.

55. The Haudenosaunee or Six Nations Confederacy of the Iroquois, who inhabited territory within the boundaries of the new provinces of Quebec and Ontario, are examples. See Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination", *University of Toronto Faculty of Law Review* 44 (1986), p. 1; Grand Chief Michael Mitchell, "An Unbroken Assertion of Sovereignty", in *Drumbeat: Anger and Renewal in Indian Country*, ed. Boyce Richardson (Toronto: Summerhill Press, 1989), pp. 107-136.

56. Note that the extent of Canada in 1867, particularly the northern extent of the provinces of Quebec and Ontario, was uncertain at the time and has never been resolved. The matter of Canada's northern boundary is discussed below under the heading *The Rupert's Land and North-Western Territory Order (1870)*.

57. This conforms with American jurisprudence on the status of the Indian tribes following the creation of the United States, after which Congress had plenary power over the tribes but they retained their right to govern themselves to the extent that Congress did not interfere: see *Cherokee Nation* v. *Georgia*, cited in note 53, and *Worcester* v. *Georgia*, 6 Pet. 515 (1932) (U.S.S.C.). For a similar decision in Canada, see *Connolly* v. *Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), at 84-87. In Canada, however, Parliament's power to interfere in the internal

affairs of the Aboriginal nations may have been severely curtailed by the enactment of section 35 of the *Constitution Act, 1982*. See discussion below under the heading *The* Constitution Act, 1982. See also Royal Commission on Aboriginal Peoples, *Partners in Confederation—Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993), pp. 31-34. Compare *Attorney General for Ontario* v. *Bear Island Foundation*, [1985] 1 C.N.L.R. 1 (Ont. S.C.) at 78; and *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), per Macfarlane J. at 519-520, Wallace J. at 592-593, but see Lambert J. at 726-731 and Hutcheon J. at 763-764, both dissenting on this issue.

58. Between 1850 and 1867, the Province of Canada enacted a number of statutes relating to Indian affairs. See Richard H. Bartlett, *The Indian Act of Canada*, second edition (Saskatoon: University of Saskatchewan Native Law Centre, 1988), pp. 3-4.

59. See *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, cited in note 52, especially per Denning M.R. Note that, before *Guerin*, cited in note 4, the federal government and legal commentators generally regarded section 91(24) as conferring jurisdiction, but not responsibility. In other words, Parliament could enact legislation dealing with Indians and their reserved lands, but the federal government was not obliged to make any special provisions for them. On this distinction, and on the way legal thinking has changed in this respect, see Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*", in *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles*, ed. David C. Hawkes (Ottawa: Carleton University Press, 1991), p. 59.

60. 22 Geo. V, chapter 4 (U.K.)

61. When the British Crown transferred Rupert's Land and the North-Western Territory to Canada in 1870, care was taken to ensure that the government of Canada acknowledged its responsibility to fulfil the fiduciary obligations of the Crown. See discussion below under the heading *Rupert's Land and the North-Western Territory Order (1870)*. For affirmation that the fiduciary obligations apply to the provincial as well as the

federal Crowns, see *Mitchell* v. *Peguis Indian Band*, cited in note 11, per Dickson C.J. at 108-109 (compare La Forest J.'s majority judgement); *Cree Regional Authority* v. *Robinson*, [1991] 4 C.N.L.R. 84 (F.C.T.D.), especially 106; Richard Bartlett, "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: *Guerin* v. *The Queen*", *Saskatchewan Law Review* 49 (1984-85), p. 374; Slattery, cited in note 51, p. 755; Morse, cited in note 59, pp. 83-84, 86.

62. The leading case on enforcement against the executive is *Guerin*, cited in note 4. However, the fiduciary obligations do not apply to statutory bodies performing quasi-judicial functions. See *N.E.B.*, cited in note 1, p. 183.

63. See Hogg, cited in note 47, chapter 12.

64. See *R.* v. *Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), affirmed [1964] S.C.R. 642. At the legislative level, the fiduciary obligations would therefore be like constitutional conventions, which are binding but unenforceable in the courts. See *Reference Re Amendment of the Constitution of Canada* (1981), 125 D.L.R. 1 (S.C.C.), commented on in W.R. Lederman, "The Supreme Court of Canada and Basic Constitutional Amendment", and Gil Rémillard, "Legality, Legitimacy and the Supreme Court", in *And No One Cheered: Federalism, Democracy and the Constitution Act*, ed. Keith Banting and Richard Simeon (Toronto: Methuen, 1983), pp. 176-188 and 189-209 respectively. It might, however, be argued that those obligations, especially to the extent that they were expressed in the *Royal Proclamation of 1763*, placed constitutional limitations on the powers of the Canadian Parliament and provincial legislatures. See *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, cited in note 52, per Denning M.R. at 91-92.

65. Note that the Parliament of Canada exercised its jurisdiction under section 91(24) primarily by enacting the *Indian Act*. See generally Bartlett, cited in note 58. While compelling arguments can be made that this legislation violates the Crown's fiduciary obligations to the Aboriginal peoples to whom it applies, an examination of this issue is beyond the scope of this paper.

66. The charter is printed in E.E. Rich, ed., *Minutes of the Hudson's Bay Company, 1671-1674* (Toronto: The Champlain Society, 1942), pp. 131-148.

67. See J. Arrowsmith's 1857 map in Norman L. Nicholson, *The Boundaries of Canada, Its Provinces and Territories* (Ottawa: Geographical Branch, Department of Mines and Technical Surveys of Canada, 1954), p. 35.

68. See Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

69. The *Ontario Boundaries* case, unreported as such but embodied in an imperial order in council made 11 August 1884, which is reproduced in *The Proceedings before the...Privy Council...Respecting the Westerly Boundary of Ontario* (Toronto: Warwick & Sons, 1889), pp. 416-418. See discussion in McNeil, cited in note 68, pp. 26-33.

70. See Kent McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have", in *Negotiating with a Sovereign Quebec*, ed. Daniel Drache and Roberto Perin (Toronto: Lorimer, 1992), pp. 113-117.

71. See McNeil, cited in note 68, pp. 4-5.

72. 31 & 32 Vict., chapter 105 (U.K.), enacted by the British Parliament to authorize the Hudson's Bay Company to make and the Crown to accept a surrender of Rupert's Land back to the Crown. The surrender was executed on 19 November 1869 and accepted by the Crown on 22 June 1870.

73. R.S.C. 1985, App. II, No. 9.

74. For historical background to the making of this order, see Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982), pp. 2-8.

75. This is because section 146 provides that any order in council admitting new provinces or territories into Canada shall have the same effect as an act of the British Parliament. The

constitutional status of this order was affirmed by its inclusion in the schedule to the *Constitution Act, 1982*.

76. See McNeil, cited in note 74, pp. 27-35.

77. The address is annexed as Schedule B to the 1870 order, cited in note 73.

78. This term was probably used in the same sense as "Indians" in section 91(24) of the *Constitution Act, 1867*, and so would include Inuit and arguably Métis people. See note 50, and McNeil, cited in note 74, pp. 13-18, 22.

79. See discussion in McNeil, cited in note 74, pp. 21-22.

80. See McNeil, cited in note 74, pp. 34-35.

81. *Rupert's Land Order*, cited in note 73, Schedule B.

82. See the *Rupert's Land Order*, cited in note 73, pp. 2-3.

83. Although the word "our" might refer to the government of Canada, more logically it refers to the Senate and the House of Commons, which made the Address. Also, non-inclusion in the order should not affect the constitutional force of this provision, as there is no requirement that all or any of the approved terms be included in the order; section 146 provides simply that the territories shall be admitted into Canada on the terms and conditions contained in the address and approved by Her Majesty. See McNeil, cited in note 74, pp. 11-12.

84. *Sparrow*, cited in note 2, p. 1109.

85. In *Sparrow*, p. 1108, the Supreme Court said that "a general guiding principle for s. 35(1)...[is that] the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples." Consequently, the Court said, "[t]he special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified." (p. 1114)

86. See McNeil, cited in note 74, pp. 25-26.

87. Before the transfer, the Hudson's Bay Company did not interfere in the internal affairs of the Indian tribes, leaving them free to govern themselves in accordance with their own laws. See testimony of Governor George Simpson before the Select Committee of the British House of Commons on the Hudson's Bay Company in 1857, *Report of the Select Committee on the Hudson's Bay Company* (London: House of Commons, 1857), Minutes of Evidence, 91-92, quoted in McNeil, cited in note 70, pp. 117-118. See also *Connolly* v. *Woolrich*, cited in note 57, affirmed (1869), 17 R.J.R.Q. 266 (Que. C.A.), and discussion of that case in Constance Backhouse, *Petticoats and Prejudice: Women and the Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society, 1991), pp. 9-20; and *Partners in Confederation*, cited in note 57, pp. 5-8. In Alberta, four Indian bands have initiated court action claiming that the *Rupert's Land Order* "affirmed the distinct place of the tribes located in Rupert's Land within Canada's federal system, and their interests as self-governing and self-determining tribes within Canada were to be respected and the means to their well being supplied". Amended statement of claim, quoted in *Montana Band of Indians* v. *The Queen*, [1991] 2 C.N.L.R. 81 (F.C.T.D.) at 83. Jerome A.C.J. summed up their claim as follows: "the plaintiffs seek a declaration stating that by these constitutional instruments the Government of Canada is bound to protect their interests as self-governing entities and their means of maintaining their material well-being, and a declaration that these constitutional instruments entail a fiduciary duty to the plaintiffs" (p. 84). His decision to strike out their statement of claim was overturned by the Federal Court of Appeal, [1991] 2 C.N.L.R. 88. At time of writing, an adjournment of this case was in effect.

88. See, for example, *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29 at 36; *Simon*, cited in note 44, p. 402; *Sioui*, cited in note 15, p. 1035; *Mitchell* v. *Peguis Indian Band*, cited in note 11, pp. 98-100, 142-147. Compare *Eastmain Band* v. *Canada*, [1993] 1 F.C. 501 (F.C.A.). We have seen that the *Rupert's Land Order* is equivalent to a British statute owing to section 146 of the *Constitution Act, 1867* (see note 75). In *Sparrow*, cited in note 2, the Supreme Court applied the same principle of interpretation to the *Constitution Act, 1982*, a British statute that of course is also part of the Canadian constitution.

89. See maps in Nicholson, cited in note 67, p. 68, Figure 14.

90. S.C. 1898, chapter 3; S.Q. 1898, chapter 6.

91. See Map 4 in McNeil, cited in note 68, p. 67.

92. See Nicholson, cited in note 67, pp. 104-107; McNeil, cited in note 68, pp. 45-47; McNeil, cited in note 70, p. 111.

93. This is because Canada did not have control over its foreign affairs at the time and so could not annex foreign territory. See McNeil, cited in note 70, especially p. 259, note 20.

94. Note that the location of the boundary between Labrador and Quebec was determined judicially in *Re Labrador Boundary*, [1927] 2 D.L.R. 401 (P.C.). However, the Quebec government has not acknowledged the binding effect of that decision. See Henri Dorion, *La frontière Québec-Terreneuve* (Québec: Les Presses de l'Université Laval, 1963); Commission d'étude sur l'intégrité du territoire du Québec, *La frontière du Labrador* [The Labrador border], Commissioners' report, volume 3 (Quebec City: 1971); Henri Brun, *Le territoire du Québec* (Quebec City: Les Presses de l'Université Laval, 1974), pp. 97-146.

95. *An Act to Extend the Boundaries of the Province of Quebec*, S.C. 1912, chapter 45; *An Act Respecting the Extension of the Province of Quebec by the Annexation of Ungava*, S.Q. 1912, chapter 7.

96. See discussion at note 70.

97. See *St. Catherine's Milling*, cited in note 51; *A.G. for Canada* v. *A.G. for Ontario*, [1897] A.C. 199 (P.C.); *Ontario Mining Company* v. *Seybold*, [1903] A.C. 73 (P.C.).

98. See Hogg, cited in note 47, pp. 353-358, on federal inter-delegation. An additional issue, which cannot be resolved here, is whether Aboriginal lands in Rupert's Land are "Lands reserved for the Indians" within the meaning of section 91(24). See references in note 51.

99. See *Reference re Term "Indians"*, cited in note 50; and Grand Council of the Crees (of Quebec), *Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada*, Submission to the United Nations Commission on Human Rights (February 1992), p. 70, note 239.

100. See discussion at notes 77 through 88.

101. The text of Treaties 1 to 7 can be found in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Toronto: Coles Publishing Co., 1979), pp. 313-375. For Treaty 9, signed in northern Ontario in 1905-06, with adhesions in 1929 and 1930, see *The James Bay Treaty*, reprinted from the 1931 edition (Ottawa: Queen's Printer, 1964). Note, however, that although the government of Canada probably thought these treaties covered lands in Rupert's Land, the extent to which that is correct depends on the unresolved question of the extent of Rupert's Land. See McNeil, cited in notes 68 and 70.

102. See Delia Opekokew, *The First Nations: Indian Government and the Canadian Confederation* (Saskatoon: Federation of Saskatchewan Indians, 1980), pp. 9-21. As the Supreme Court of Canada decided in *Sparrow*, cited in note 2, p. 1099, there must be "clear and plain" intent for Aboriginal rights to be extinguished, and any right of self-government that the Aboriginal peoples who signed the treaties previously had would not have been surrendered unless that was clearly expressed and understood by both sides. Moreover, as Canada was constitutionally obliged to protect the "interests and well-being" of the "Indian tribes" in Rupert's Land, it could not diminish or extinguish their right of self-government without their consent.

103. See McNeil, cited in note 70.

104. 34-35 Vict., chapter 28 (U.K.).

105. *Sparrow*, cited in note 2, p. 1104.

106. *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, chapter 32, section 7; *An Act Approving the*

Agreement Concerning James Bay and Northern Quebec, R.S.Q. 1977, chapter C-67, section 5.

107. Grand Council of the Crees, cited in note 99, p. 71, note 240.

108. *James Bay and Northern Quebec Agreement and Complementary Agreements* (Quebec City: Éditeur officiel du Québec, 1991).

109. Although an interim injunction was granted by the Superior Court (*Chef Max "One-Onti" Gros-Louis* v. *Société de développement de la Baie James*, [1974] R.P. 38), it was quashed by the Quebec Court of Appeal, which held that the balance of inconvenience was in the Crown's favour (*Société de développement de la Baie James* v. *Chef Robert Kanatewat*, [1975] C.A. 166).

110. This issue is discussed in Renée Dupuis, *La Question indienne au Canada* (Montreal: Éditions du Boréal, 1991), pp. 76-89.

111. *In All Fairness: A Native Claims Policy* (Ottawa: Indian Affairs and Northern Development, 1981), pp. 9, 11.

112. Cited in notes 90 and 95 respectively.

113. Cited in note 106.

114. See in this connection Renée Dupuis, "Historique de la négociation sur les revendications territoriales du Conseil des Atikamekw et des Montagnais (1978-1992)", *Recherches Amérindiennes au Québec* XXIII/1 (1993).

115. JBNQA, cited in note 108, Complementary Agreement No. 1, p. 457.

116. JBNQA, cited in note 108, p. 13.

117. See *James Bay and Northern Quebec Native Claims Settlement Act*, cited in note 106, section 7.

118. Cited in note 106.

119. S.Q. 1979, chapter 16, consolidated at R.S.Q., chapter S-3.2.

120. S.Q. 1978, chapter 94, consolidated at R.S.Q., chapter Q-2.

121. [1992] 1 F.C. 440 at 463-464, 470. This judgement has been appealed to the Federal Court of Appeal.

122. *Eastmain Band* v. *Canada*, cited in note 88, p. 517. The Supreme Court of Canada refused leave to appeal.

123. *Eastmain Band* v. *Canada*, p. 517.

124. *N.E.B.*, cited in note 1.

125. By the *Constitutional Amendment Proclamation, 1983*, SI/84-102.

126. For analyses of section 25, see Bruce H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988); William Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982. Part I: The Interpretive Prism of Section 25", *University of British Columbia Law Review* 22 (1988), p. 21.

127. See Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms: A Legal Perspective", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994).

128. As the *Constitution Act, 1982* was enacted by the British Parliament as Schedule B to the *Canada Act 1982*, 1982, chapter 11 (U.K.), the obligation in this context was probably political rather than legal. See also note 64.

129. *Sparrow*, cited in note 2, p. 1119.

130. *Sparrow*, pp. 1108, 1114.

131. See Hogg, cited in note 47, p. 693: "It would surely be contrary to the federal government's fiduciary duty to the aboriginal peoples to proceed with a constitutional amendment affecting aboriginal or treaty rights without at least the active participation of the aboriginal peoples." For Hogg, Aboriginal participation is required even for constitutional amendments "that make no direct

change to any of the identified constitutional provisions but which do impair aboriginal or treaty rights" (p. 695, note 161). See also Neil Finkelstein and George Vegh, *The Separation of Quebec and the Constitution of Canada*, Background Study No. 2, York University Constitutional Reform Project (North York: York University Centre for Public Law and Public Policy, 1992), pp. 14-25.

132. Cited in note 4.

133. *Sparrow*, cited in note 2, p. 1108.

134. (1981), 34 O.R. (2d) 360 at 367, MacKinnon C.J.

135. *Sparrow*, cited in note 2, p. 1108.

136. Simply stated, the test requires, first, proof of a valid legislative objective, and second, that the objective has been fulfilled with as little infringement of Aboriginal rights as possible in the circumstances. The Court said: "The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified." (*Sparrow*, p. 1114)

137. *Sparrow*, p. 1119.

138. *Sparrow*, p. 1109. Although not stated expressly by the Supreme Court, it is apparent that only legislative acts and regulations, not executive decisions, can be justified by the *Sparrow* test. See *Adams*, cited in note 23.

139. See discussion at notes 81 through 85.

140. *Sparrow*, cited in note 2, p. 1105.

141. See Brian Slattery, "First Nations and the Constitution: A Question of Trust", *Canadian Bar Review* 71 (1992), pp. 284-285; Hogg, cited in note 47, p. 693. See also *Hydro-Quebec* v. *Canada (A.G.) and Coon Come*, [1991] 3 C.N.L.R. 40 (Que. C.A.) at 59.

142. In "First Nations and the Constitution", cited in note 141, Slattery wrote: "Under section 92, the Provinces do not possess the power to legislate in relation to Aboriginal and treaty rights, and so the question of justification under section 35 simply does not arise." (p. 285)

143. Later in this paper, we will see that provincial laws that are referentially incorporated into federal law by section 88 of the *Indian Act* apparently can be justified by the *Sparrow* test if they infringe Aboriginal rights. See note 157 and accompanying text.

144. See, for example, *R.* v. *Joseph*, [1990] 4 C.N.L.R. 59 (B.C.S.C.); *R.* v. *Bombay*, [1993] 1 C.N.L.R. 92 (Ont. C.A.).

145. *Sparrow*, cited in note 2, p. 1114. See also text at notes 134 through 137.

146. See note 50.

147. *Sparrow*, cited in note 2, p. 1108 [emphasis added].

148. See *Guerin*, cited in note 4, especially per Dickson J. at 383-385. See also *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (F.C.A.), leave to appeal to S.C.C. granted, [1993] 4 C.N.L.R. vi.

149. See note 64 and accompanying text.

150. This conclusion is based on our interpretation of the *Sparrow* decision. See notes 132-139 and accompanying text.

151. Discretionary power by the fiduciary over the beneficiary's interests is one of the hallmarks of a fiduciary relationship. See *Lac Minerals*, cited in note 7, pp. 598-600, 645-646.

152. Many examples of the Crown's statutory powers can be found in the *Indian Act*. For instance, the Crown is authorized by sections 37 to 41 to accept surrenders of reserve lands and to carry out the terms of any surrender. These statutory powers result in fiduciary obligations. See *Guerin*, cited in note 4. The existence of prerogative powers over Aboriginal peoples is a matter of controversy. Although discussion of this matter is beyond the scope of this paper, it should be noted that a strong argument can be made that if the Crown did have any prerogative power

to infringe Aboriginal and treaty rights, that power was abolished by the entrenchment of those rights in section 35 of the *Constitution Act, 1982*.

153. Although the term 'Indians' in section 91(24) has been interpreted to include Inuit, no authoritative determination has been made as to whether it includes Métis people as well. See note 50. However, since the inclusion of Métis people in the definition of "aboriginal peoples of Canada" in section 35 of the *Constitution Act, 1982*, the arguments for interpreting section 91(24) as including all the Aboriginal peoples are even more compelling than before. It would make little sense for Métis people to have the same guarantees of their rights in section 35 as Indian peoples and Inuit, but to be subject to provincial rather than federal jurisdiction with regard to those rights. For purposes of our discussion, we will therefore assume that Parliament's jurisdiction under section 91(24) extends to Aboriginal peoples generally. This assumption is supported by *R.* v. *Alphonse*, [1993] 4 C.N.L.R. 19 (B.C.C.A.) at 37-8.

154. See notes 140-143 and accompanying text.

155. Section 88 provides that, "Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act."

156. According to *R.* v. *Dick*, [1985] 2 S.C.R. 309, provincial laws of general application that could not apply to Indians of their own force are referentially incorporated into federal law by section 88, subject to the exceptions mentioned there. The constitutionality of section 88 was upheld in *R.* v. *Alphonse*, cited in note 153, pp. 38-41, and *R.* v. *Dick*, [1993] 4 C.N.L.R. 63 (B.C.C.A.) at 69. In both cases, it was decided that the section is not inconsistent with section 35(1) of the *Constitution Act, 1982*. For an argument that section 88 was rendered unconstitutional by section 35(1), see Slattery, cited in note 141, pp. 285-286.

157. See *R.* v. *Alphonse*, cited in note 153, pp. 41-46, and *R.* v. *Dick*, cited in note 156, pp. 69-72. In both cases, the B.C.C.A. applied the *Sparrow* test to the British Columbia *Wildlife Act* (S.B.C. 1982, chapter 57) which, the Court held, had been referentially incorporated into federal law by section 88.

158. See notes 18-30 and accompanying text.

159. See notes 81-88 and accompanying text.

160. This includes both the federal and provincial Crowns. For example, in situations where a treaty provision to set aside reserves could be fulfilled only with the co-operation of a provincial Crown, the provincial Crown would be under a fiduciary obligation to provide that co-operation. In *Ontario Mining Company* v. *Seybold*, cited in note 97, p. 82, Lord Davey assumed that the Ontario government, in taking advantage of the surrender of Indian lands by Treaty 3 in 1873, "came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves." In light of the subsequent development of the fiduciary obligation in Canadian Aboriginal rights jurisprudence, starting with *Guerin* (cited in note 4), Lord Davey's "honourable engagement" has probably become a binding legal obligation.

161. See notes 132-139 and accompanying text.

162. It must be kept in mind, however, that Aboriginal peoples had no say in the creation of the Canadian constitution. It was imposed on them without their consent through the now unacceptable process of colonialism. See Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*", *Alberta Law Review* 29 (1991), p. 498; and Kent McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments", *Western Legal History* 7 (1994), p. 113. This raises questions of legitimacy in so far as the application of the constitution to Aboriginal peoples is concerned. While further consideration of this issue is beyond the scope of this paper, it should not be forgotten.

163. See *Cherokee Nation* v. *Georgia*, cited in note 53; *Worcester* v. *Georgia*, cited in note 57; *Connolly* v. *Woolrich*, cited in note 57; *Sioui*, cited in note 15; and Brian Slattery, "First Nations and the Constitution", cited in note 141. Regarding French assertions of sovereignty, see Brian Slattery, *French Claims in North America, 1500-1559* (Saskatoon: University of Saskatchewan Native Law Centre, 1980); W.J. Eccles, "Sovereignty-Association, 1500-1783", *Canadian Historical Review* 65 (1984), p. 475; and Cornelius J. Jaenen, "French Sovereignty and Native Nationhood during the French Régime", in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), p. 19.

164. Contrast *A.G. for Ontario* v. *Bear Island Foundation*, cited in note 57 (affirmed by the Supreme Court of Canada without reference to this issue); *Delgamuukw* v. *British Columbia*, cited in note 57, pp. 519-520, 592-593; *R.* v. *Nikal*, [1993] 4 C.N.L.R. 117 (B.C.C.A.) at 138.

165. See *Partners in Confederation*, cited in note 57; and McNeil, cited in note 127. As we saw earlier in the paper, the extent of Canada's legislative jurisdiction over Aboriginal peoples was limited by certain constitutional provisions; see discussion of the *Rupert's Land Order*, at notes 77-88.

166. To be effective, legislative extinguishment of Aboriginal rights before that time had to be "clear and plain" (*Sparrow*, cited in note 2, p. 1099).

167. See *Partners in Confederation*, cited in note 57, p. 35. Note that an inherent right of self-government may also exist outside the confines of the Canadian constitution, similar to the right of self-government of the Indian tribes in the United States; see cases cited in note 163.

168. See Kent McNeil,"Envisaging Constitutional Space for Aboriginal Governments", *Queen's Law Journal* 19 (1993), especially pp. 133-136.

169. Any such amendment would, of course, have to be made in accordance with the fiduciary considerations discussed earlier in the context of section 35.1; see text at notes 128-131. The right

of self-government could also be surrendered voluntarily by an Aboriginal people, but it seems unlikely that this would ever happen. Even if an Aboriginal people chose not to exercise its right of self-government, there would be no reason to give up the option of exercising the right at some time in the future. (Treaty rights, and presumably Aboriginal rights as well, do not lapse as a result of non-use: *Sioui*, cited in note 15, p. 1066.)

170. See note 136.

171. See discussion at notes 132-139.

172. *Sparrow*, cited in note 2, p. 1114.

173. For an analysis of these provisions, see Bartlett, cited in note 58, pp. 17-23.

174. See Slattery, cited in note 141, p. 279.

175. See Slattery, cited in note 141, especially p. 273.

176. See discussion at notes 58-61.

177. *Sparrow*, cited in note 2, p. 1109.

178. See discussion beginning after note 143.

179. *Rupert's Land Order*, cited in note 73, discussed at notes 77-88.

180. Cited in note 4.

181. *Guerin*, cited in note 4, p. 376.

182. *Guerin*, pp. 349, 350. Dickson also saw the Crown's role as protective, since the surrender requirement giving rise to the fiduciary obligation was established "to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited" (p. 383).

183. See discussion at notes 18-30 and 77-88.

184. See also *Apsassin* v. *Canada*, cited in note 148.

185. In *Guerin*, Justice Dickson stated, "While the existence of the fiduciary obligation which the Crown owes to the Indians is dependent on the nature of the surrender process, the standard of conduct which the obligation imports is both more general and more exacting than the terms of any actual surrender" (p. 389). See also *Apsassin* v. *Canada*, cited in note 148, especially p. 50.

186. *Sparrow*, cited in note 2, p. 1108.

187. See also *R.* v. *Lewis*, [1993] 4 C.N.L.R. 98 (B.C.C.A.) at 110.

188. See also *Canadian Pacific Limited* v. *Paul*, [1988] 2 S.C.R. 654; *Roberts* v. *Canada*, [1989] 1 S.C.R. 322; *A.G. Ontario* v. *Bear Island Foundation*, cited in note 11.

189. *N.E.B.*, cited in note 1, p. 183.

190. See note 50.

191. See notes 48-65 and accompanying discussion.

192. See notes 132-139 and accompanying text.

193. Section 35(3) of the *Constitution Act, 1982* provides that treaty rights include rights arising from land claims agreements.

194. Although the territorial extent of the Royal Proclamation's application remains controversial, a number of cases have decided that it does not apply throughout Canada. See, for example, *Sigeareak* v. *R.*, [1966] S.C.R. 645; *Delgamuukw* v. *British Columbia*, cited in note 57, pp. 521, 593-595; *Côté*, cited in note 23, pp. 1361-1363.

195. *Referendum Act*, R.S.Q., chapter 64.1, referred to in section 17 of the draft bill on Quebec sovereignty.

196. *Les nations autochtones au Québec et la participation aux scrutins* (Quebec City: Director General of Elections of Quebec, September 1992).

197. In *Native Women's Association of Canada* v. *Canada*, [1994] 3 S.C.R. 627, the Supreme Court of Canada denied that the right to participate in constitutional discussions is derived from any

Aboriginal or treaty right protected under section 35 of the *Constitution Act, 1982*, but the court did not consider the relevance of fiduciary obligations in this context.

198. See *Madzimbamuto* v. *Lardner-Burke*, [1969] 1 A.C. 645 (P.C.), where the majority opinion of Lord Reid expressed the view that a UDI by the Smith regime in Southern Rhodesia in 1965 was unlawful, as it violated the constitution and was inconsistent with Britain's continuing assertion of authority over Southern Rhodesia. See also *Adams* v. *Adams*, [1970] 3 All E.R. 572 (P.D.A.), where Sir Jocelyn Simon P. applied the *Madzimbamuto* decision. Although there are obvious distinctions between the situation in Southern Rhodesia and in Canada, there is a common underlying constitutional principle. In the case of Southern Rhodesia, the Smith government could not take away the jurisdiction of Britain because it did not have the constitutional authority to do so. Similarly in Canada, no provincial government or legislature could take away the authority of Canada because that would violate the constitution. To the extent that any province attempted to do so, its acts would be beyond the province's powers, and so would have no force or effect in Canadian constitutional law.

199. The position in Quebec law would depend on whether Quebec courts accepted a UDI. Assuming that the Quebec courts would accept a UDI, a situation of conflict between two legal regimes would be created. In this context, other factors, such as international recognition of Quebec's independence, would also be relevant. As this paper relates only to the obligations of Canada in the Canadian legal regime, it is not necessary for us to speculate on how this conflict might be resolved.

200. See discussion in Finkelstein and Vegh, cited in note 131, pp. 33-55.

201. This raises a complex issue – which cannot be resolved here – of Canada's constitutional competence in this regard. There are arguments both ways. On one hand, nothing in the constitution explicitly gives Parliament or the government of Canada the authority to recognize the independence of a seceding province. As secession by one province would have serious implications for the other provinces, as well as for Aboriginal peoples,

recognition by Canada might be ineffective without a constitutional amendment. On the other hand, Canada might attempt to rely on the emergency aspect of its peace, order and good government power for authority to act on its own. For further discussion of this issue, see Finkelstein and Vegh, cited in note 131, especially pp. 40-41, 51-54.

202. See *Adams* v. *Adams*, cited in note 198, pp. 583, 585. See also *The Faguernes*, [1927] P. 311; *R.* v. *Kent Justices*, [1967] 1 All E.R. 560; and *Post Office* v. *Estuary Radio*, [1968] 2 Q.B. 740, all of which held that a clear declaration from the government (in those cases the British government) that a given territory is within the Crown's dominions is binding on the courts.

203. In *Madzimbamuto* v. *Lardner-Burke*, cited in note 198, p. 724, Lord Reid acknowledged that the courts must take account of successful revolutions where a new regime establishes unchallenged control over a territory and is thereafter "universally recognized as lawful". However, it is a different matter where there are "two rivals contending for power", one lawful and the other unlawful. Lord Reid said:

> If the legitimate Government had been driven out but was trying to regain control it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate Government was opposing the lawful ruler. (p. 725)

So as long as the government of Canada continued to assert its sovereignty over Quebec, acts of the Quebec government that were inconsistent with Canadian sovereignty would have no validity, force or effect in Canada.

204. This could probably be done by constitutional amendment, but representatives of the Aboriginal peoples would have to be invited to participate in the conference convened for that purpose, and fiduciary obligations would apply in that context. See discussion beginning after note 128.

205. Federal minister of Indian affairs Ron Irwin acknowledged this in Quebec City on 17 May 1994, at a federal-provincial conference on Aboriginal affairs. See Michel Venne, "Johnson défend l'intégrité du territoire québécois", *Le Devoir*, 19 May

1994, p. A1; Rhéal Séguin, "Irwin reassures Quebec natives", *Globe and Mail*, 18 May 1994, p. A1; Robert MacKenzie, "Natives step into separatist debate", *Toronto Star*, 18 May 1994, p. A1.

206. Quebec independence would affect the interests of all the Aboriginal peoples of Canada, especially peoples – such as the Algonquin, Crees, Inuit, Innu, Mi'kmaq, Mohawk and Montagnais – whose territories and peoples are located both within and outside Quebec.

207. This duty to consult before taking action that would affect their rights arises from the fiduciary relationship between the government of Canada and Aboriginal peoples. See *Sparrow*, cited in note 2, p. 1119.

208. *Sparrow*, especially pp. 1116, 1119.

209. See discussion beginning after note 131.

210. *Constitution Act, 1982*, sections 35.1 and 38(1).

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ISBN 0-660-15581-8